Supreme Court of the United States.

JOHN ARBUCKLE, WILLIAM V. R. SMITH, JAMES N. JARVIE and WILLIAM A. JAMISON, Appellants, vs. JOSEPH E. BLACKBURN, Dairy and Food Commissioner of the State of Ohio, Appellee.	Brief for Appellants.

I.

Statement of the Case.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Sixth Circuit, affirming the decree of the Circuit Court of the United States for the Southern District of Ohio, dismissing the bill herein.

The action was for injunction. The dismissal of the bill was upon hearing, before answer, on application for preliminary injunction. No answer was ever filed. The allegations of the bill therefore stand uncontradicted, as on demurrer.

The only question seriously argued or considered below has been as to the jurisdiction of the court to grant such relief.

The bill of complaint herein sets forth:

The complainants, copartners doing business under the name of Arbuckle Brothers, are all residents of New York State (Rec., p. 2).

The respondent is a resident of Ohio, and the Dairy and Food Commissioner of that State (Record, p. 2).

Arbuckle Brothers manufacture in New York and Pennsylvania, exclusively, Ariosa, a preparation of coffee, in general use for ordinary food purposes, etc., and ship it into Ohio on orders for sale there; where stocks of a million pounds, of value $100,000 are kept by plaintiffs, besides large quantities kept on hand by more than ten thousand others, wholesale and retail dealers (Rec., p. 6).

As thus marketed, Ariosa is a mixture or compound of roasted coffee, eggs and sugar, each a common, healthy, and unobjectionable article of food, and pure, wholesome and healthful (Rec., pp. 5 and 6).

Ariosa is thus prepared: The sugar and egg ingredients thereof are made, by the aid of water, into a paste or glaze, and by mechanical means so applied to the coffee berry while freshly roasted as, first, completely to coat it with such glaze, and then, the water portion of the glazing being dried out by applied heat and air, to leave the coffee-berry hermetically sealed by a transparent colorless coating of mixed sugar and eggs. The physical tendency and effect of this is to prevent or retard both the loss by the coffee of its aroma or other qualities, and the acquisition by it, from the air, of foreign matter (Rec., p. 3).

Its effect upon the appearance of the coffee is that of varnish, not assimilating it to other grades of coffee or changing its size, but accentuating the color of each berry, as well as the contrast between normal berries and those which are darker or lighter, larger or smaller (Rec., p 7).

Ariosa is thus imported into Ohio and there ex-

posed for sale, exclusively in the original packages in which it is packed at Brooklyn, N. Y., each containing one pound, securely wrapped in a closed and sealed wrapper, which is entirely opaque, and which is distinctly labeled with a printed statement of its exact composition, and the proportion of each of its ingredients (Rec. p. 10).

Above has been the case for more than thirty years, that is to say: A similar mixture or compound of coffee, similarly prepared and packed, and bearing a similar statement, has been marketed throughout Ohio by complainants and their predecessors, under the name Ariosa. During all that time and now, it neither has been sold, nor exposed for sale or sold, in such manner as to disclose to the purchaser the appearance of Ariosa, or of the coffee-berries included therein, except in so far as he may infer the same from his former experience in its use, or be informed by such printed statement on the package, which is as follows (Rec., p. 4).

"ARIOSA"

"Is a Compound made from coffee, sugar and eggs.

"The coffees are selected especially for their strength, flavor, and superior drinking qualities, are pure, sound coffee, and absolutely free from all the poisonous coloring substances which are now so largely used to improve the appearance of coffee. Coffee when roasted is porous, and, unless prevented, loses its best qualities and absorbs others which are injurious to it. By our process of HERMETICALLY SEALING the pores of roasted coffee we secure a threefold object:

"1st. The retention of the full strength and aroma for any length of time.

"2nd. The prevention through absorption of any injurious flavors.

"3rd. The saving to the consumer of the additional expense of eggs incurred when any other coffee is used. 'Ariosa' is self-settling.

"Choice eggs and pure granulated sugar are the only articles used in HERMETICALLY SEALING ARBUCKLE'S ARIOSA COFFEE.

"FORMULA."

Coffee	.99278
Eggs	.00361
Sugar	.00361

"Four Pounds Roasted Coffee goes as far as Five Pounds Green, as Coffee loses 20 per cent. in roasting."

By act of the Legislature of Ohio, passed March 20, 1884 (and since amended, but not in particulars material here), entitled:

"*An Act to provide against the adulteration of food and drugs,*"

the sale or offer for sale of any adulterated drug or article of food within the State of Ohio is prohibited; and in the body of such act it is provided that an article shall be considered adulterated within the intent of the act. In the case of food:

* * * "(6) If it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is" (Rec., p. 3) (provided, however, that)

"The provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered for sale be distinctly labeled as mixtures or compounds, with the name and per cent. of each ingredient therein, and are not injurious to health."

As thus manufactured and shipped into Ohio by complainants, and as sold or offered for sale in Ohio, Ariosa is neither so colored, coated, polished or powdered as to conceal damage or inferiority, or in any way made to appear better or of greater value than it really is, nor in any way such that the sale or offer for sale thereof is within the prohibition of said statute (Rec., pp. 5–7).

Nevertheless, the defendant, both personally and through his agents, has heretofore, does now, and will, unless restrained by the Court, continue to widely advertise, give out and state that said process used in the manufacture of said Ariosa, is within the prohibition of, and in violation of, the aforesaid statute, and that clause (6) above quoted wholly forbade the glazing of coffee as in said manufacture of Ariosa.

Respondent has also menaced and threatened with prosecution and still menaces and threatens to prosecute dealers in and vendors of said Ariosa in Ohio, for a violation of said statute, and unless restrained by injunction will institute a large number of prosecutions against such dealers in and vendors of Ariosa, upon the wrongful and erroneous charge that the treatmont of said Ariosa by said process is a violation of said statute, and said Ariosa an adulterated food product within said statute, and the prohibition thereof.

By reason of respondent's official capacity, and the fact that he claims to act under the said statute intended to prevent the adulteration of food products, respondent's statements and threats of prosecution have led, do lead, and will hereafter continue to lead, the dealers in and consumers of Ariosa throughout the United States, and more particularly in Ohio, to doubt the healthful character and proper preparation of the said food product and the integrity of the complainants, as manufacturers thereof, and have deterred, do deter, and will hereafter deter, both wholesale and retail dealers and consumers in Ohio and elsewhere from purchasing, vending or using Ariosa (Rec., p. 7).

On or about the fifth day of February, 1901, the respondent, for the purpose of intimidating the customers of the complainants, and deterring them from purchasing or dealing in said Ariosa, issued, or caused to be issued, over his signature, to dealers in and vendors of Ariosa, and others, within Ohio, a

certain circular letter or statement in the words and figures following, to wit:

"STATE OF OHIO,
"OFFICE OF DAIRY AND FOOD COMMISSIONER.

"DEAR SIRS: Replying to your inquiry about the coffee situation, would say that this matter is now under consideration and investigation by the chemists of this department. As soon as conclusions are reached, a circular notice will be sent to all the jobbers in Ohio, and a sufficient number will be furnished to supply all their salesmen.

I might say that the following firms have agreed to accept the law as construed by this department: Andrus, Scofield & Co., Columbus; Dayton Spice Mills, Dayton; Woolson Spice Co., Toledo.

W. F. McLaughlin & Co., of Chicago, have agreed to comply with the laws as soon as construed by the Court.

The only firm that has refused, and still refuses to accept the ruling of this department, or to abide by the laws of the State as construed by our Supreme Court, is Arbuckle Bros., of New York.

"Very truly yours,
"J. E. BLACKBURN,
"Dairy and Food Commissioner.
"COLUMBUS, OHIO, February 5, 1901."
(Rec., pp. 7 and 8.)

Said circular letter or statement was wholly false in this, to wit, that complainants had not at any time refused to accept said construction of said statute as construed by the Supreme Court of said State, and also in that the Woolson Spice Company had not agreed to accept the said law as construed by respondent, but on the contrary, had refused, and still refuse, to accept such construction and still continued to sell in the State of Ohio coffee prepared and glazed by processes for a long time used by them (Rec., p. 8).

Respondent's said circular, while purporting to be an answer to an inquiry, was in fact by said re-

spondent sent generally to jobbers and dealers in food products within Ohio, few, if any, of whom had, in fact, inquired as therein stated, and was so circulated, without such inquiry, for the purpose of intimidating complainants and their customers, and with the effect of injuring complainants and their property (Rec., p. 8).

In pursuance of his wrongful and unlawful intention of intimidating the complainants and their customers in Ohio, and of deterring them from the purchase and sale of Ariosa, respondent, unless restrained by the Court, will, as announced in his aforesaid circular, issue other and further circulars to dealers in food products in Ohio in large quantities, and will cause the same to be widely published and distributed throughout Ohio and elsewhere; and such subsequent circulars will be directed against the complainants alone, with the intent, purpose and effect of discriminating against complainants and their said product, and of irreparable injury to the sale thereof, the value of the existing stocks thereof in Ohio, and the trade of complainants and the good-will of their business (Rec., p. 9.)

The unconscionable nature of the Commissioner's claims and threatened procedure, the multiplicity of suits involved, the irreparable damage to complainants and the inadequacy of any remedy except resort to equity are fully set forth (Rec., pp. 6–11).

One of the grounds on which the Federal courts were asked to take jurisdiction was that the plaintiffs, being residents of New York, were non-residents of Ohio, the State of defendant's residence.

Others were:

1. Said statute, construed as respondent claims it should be, is in conflict with the fourteenth amendment to the Constitution of the United States, and void, (*a*) in that it would deprive complainants of their aforesaid property by prohibiting them from selling in Ohio, and dealers in, and vendors of, food

products from purchasing from the complainants pure food products, which are ordinary articles of food and are not injurious to health, to wit: coffee, sugar and eggs, &c., (Rec., p. 9), and (*b*), that this would deprive complainants not only of their property rights acquired in said food products as aforesaid, but, further, would largely destroy the market value of the existing stock of Ariosa in the possession of complainants in Ohio and elsewhere, and would deny to complainants and to the dealers in and vendors of said Ariosa within the jurisdiction of the State of Ohio the equal protection of the law (Rec., p. 10).

2. Ariosa is manufactured and treated, according to the aforesaid process, at complainants' factories in New York and Pennsylvania, and not in Ohio. After being so manufactured and treated in its said factories, packed in packages, and is, in said original packages, shipped by complainants into Ohio, and is sold in such original packages, and said statute, if construed as the respondent herein claims it should be, is a regulation by the State of Ohio of interstate commerce, and is repugnant to and in violation of the third clause of section eight of article one of the Constitution of the United States and void (Rec., p. 10).

In addition to these grounds for federal jurisdiction alleged by complainants, still another was raised by the Court in its judgment of dismissal, from which this appeal was taken, its opinion stating as one ground therefor:

> "It seems clear that this action cannot be maintained consistently with the eleventh amendment to the Constitution withholding the judicial power of the United States from suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or citizens or subjects of any foreign State" (Rec., p. 85).

As grounds for the relief asked the bill also alleges, that, "owing to the number of dealers in and vendors of Ariosa in Ohio, who would, under the respondent's wrongful and erroneous construction of said statute, be liable to prosecution and so prosecuted if the respondent were permitted to carry out his said threats and menaces, a multiplicity of suits would necessarily arise in many local courts, involving identical questions relating to the existence, constitutionality, construction, scope and effect of said statute and to the complainants' rights of property in Ohio, and to the effect thereon of said statute, wherein complainants' rights of property in Ohio would be adjudicated in litigations to which complainants would not be, and could not be, parties; all to the great and lasting prejudice and damage of complainants, who would there have no adequate remedy at law in the premises (Rec., p. 10).

That the interests of dealers who might be prosecuted were, in many cases, not in common with, nor representative of, those of complainants', and, therefore, that there was great and imminent danger that in many of such suits and prosecutions, either through lack of interest or in wrongful collusion and conspiracy with the respondent, no defense would be made by the defendants therein, and that thereby the question of the construction of said statute would, in many of said suits and prosecutions, not be properly or skillfully presented and passed upon.

That although such prosecutions should uniformly result in the acquittal of the persons thereby charged, yet by reason of the multiplicity thereof and the avowed determination of the respondent to prosecute all persons selling, or offering for sale, in Ohio, complainants' said product, the mere wrongful prosecutions and threat of such will result in deterring many, if not all, dealers in food products in Ohio, from dealing in Ariosa, and thereby prevent complainants from selling their said product in

said State, to complainants' great and irreparable injury (Rec., p. 11).

That by the said statements, menaces and threats of the respondent and the prosecutions threatened to be instituted by him, complainants' trade, in Ohio and elsewhere, the good-will thereof, and the market value of the existing stocks of Ariosa in the possession of complainants, would be damaged, depreciated and diminished in value to the extent of more than one hundred thousand dollars (Rec., p. 11).

In conclusion, complainants prayed that the respondent be enjoined:

> "1. From stating or charging that complainants' said food product, Ariosa, being a compound of pure roasted coffee, mixed, treated, coated and glazed with a preparation of sugar and eggs, according to the formula and by the process hereinbefore set forth, is an article of food adulterated within the meaning of said statute, and that the use of complainants' said process of coating and glazing the coffee, constituting the chief ingredient of Ariosa, with a preparation of sugar and eggs, as hereinbefore more particularly described, constitutes a violation of said statute, and that the importation of said Ariosa into Ohio, or the selling of, or offering for sale, the same constitutes a violation of said statute.
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> 2. From charging the complainants herein, or any of them, or said firm of Arbuckle Brothers, or any dealer in Ariosa, with violating said statute by selling, or offering for sale, Ariosa, or with adulterating food, in violation of said statute, by reason of the aforesaid treatment and coating of the coffee forming an ingredient of Ariosa with a preparation aforesaid.
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> 3. From charging the complainants, or any of them, or said firm of Arbuckle Brothers, with violating the said statute by adopting and using said process of coating above described, or by selling, or offering for sale, Ariosa, so glazed.
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> 4. From charging any dealer in Ariosa with the possession, offering for sale, or sale of, an

adulterated food product, within the meaning of said statute, in having in their possession, offering for sale, or selling Ariosa, so glazed.

5. From menacing and threatening any dealer in Ariosa so glazed with prosecution for having in his possession, offering for sale, or selling such Ariosa.

6. From instituting, or commencing, against any person, partnership or corporation, having in his, their or its possession, offering for sale, or selling Ariosa, any action, suit, proceeding or prosecution, based upon the treatment and coating of the coffee forming an ingredient of said Ariosa with a preparation of sugar and eggs, according to the formula and by the process more particularly above described; and

7. And for such further relief as to the court might seem equitable and proper in the premises" (Rec., p. 12.)

This bill, coming before the Circuit Court of the United States for the Southern District of Ohio, on application for temporary injunction, the Court denied the application and dismissed the bill, on grounds shown by the opinion filed (Rec., pp. 65–68):

"The complainants, in their bill, alleged, in substance, that they manufacture and sell a preparation of coffee, known as Ariosa, which 'is a mixture or compound of roasted coffee, eggs and sugar—each a common, healthy and unobjectionable article of food'; that they have manufactured and sold it for more than thirty years; that it has gained great repute and sale and is generally used in Ohio and throughout the United States; that the good-will of the business of its manufacture and sale has become very valuable; that it is sold in Ohio in one-pound packages, which, in compliance with the laws of Ohio, providing against the adulteration of food, is distinctly labeled with a printed statement of its precise composition and the proportion of each of its ingredients; but that notwithstanding these facts the respondent, as dairy and food commissioner of Ohio, has notified complainants that he considers Ariosa, as put up by them,

an adulteration, and has issued a circular letter to dealers and vendors wrongfully charging that complainants in the manufacture and sale thereof, refuse to abide by the laws of Ohio, providing against the adulteration of food, and proposes to institute prosecutions to prevent and punish its sale or offer for sale in Ohio; that if the respondent 'be permitted to commit the threatened wrongs the same will, as complainants are informed and believe, damage complainants to the extent of more than $100,000, an amount largely in excess of respondent's ability to respond in judgment'; and that the statute of Ohio providing against the adulteration of food 'construed as respondent claims it should be, is in conflict with the fourteenth amendment to the Constitution of the United States and void.'

"And they pray that the respondent be perpetually enjoined." * * *

"The respondent resists the application upon the ground that the bill does not state facts sufficient to entitle the complainants to the relief prayed for.

"It is not alleged that the Ohio statute providing against the adulteration of food is in conflict with the fourteenth amendment to the Constitution of the United States, but the suggestion is that if construed as the respondent claims it should be, it will be in conflict with that amendment. * * *

"Now, the court is asked to hear evidence and determine this issue, and if it is found in favor of the complainants, to enjoin the dairy and food commissioner of Ohio from prosecuting any one who may manufacture, sell or offer to sell Ariosa in Ohio. * * *

"* * * It is a case where the Court is asked to restrain and prevent criminal prosecutions until it can first determine whether they should be instituted or not. * * *

"The bill will, therefore, be dismissed."

On appeal to the Circuit Court of Appeals, that court sustained the judgment of dismissal, and filed an opinion, from which the following is quoted (Rec., p. 83):

"The matter to be reviewed is the sufficiency of the bill and amendment to warrant the in-

tervention of a court of equity to restrain the defendant as prayed.

"An analysis of the bill shows the claim to be that respondent, the dairy and food commissioner of the State of Ohio, is proceeding upon an alleged false and erroneous construction of the statutes of Ohio to prosecute persons in Ohio dealing in the complainant's product known as Ariosa, and in giving out the statement that this product is sold in violation of the laws of the State. * * * It appears that the coffee of the complainant is coated, after roasting, with a compound of sugar and eggs for the purpose, as alleged in the bill, of retaining the full strength of the coffee, 'preventing the absorption of any injurious or noxious gases or flavors, and settling the same when prepared for consumption,' thus bringing Ariosa within the terms of the Ohio law, which provides that the act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, 'if each and every article sold or offered for sale be distinctly labeled as a mixture or compound with the name and per cent. of each ingredient therein, and are not injurious to health.' It is claimed that, notwithstanding Ariosa is thus labeled with a statement of the elements of the compound and is not injurious to health, the food commissioner is threatening proceedings, and is claiming that the same is within the prohibition of the sixth clause of the statute above quoted, making it an offense to coat an article of food, whereby damage or inferiority is concealed, and the same made to appear better or of greater value than it really is. It is urged that this statute 'construed as respondent claims it should be,' is in conflict with the fourteenth amendment of the Constitution, as it deprives the complainants of their property by prohibiting them from selling it in Ohio and dealers from selling the same in that State, notwithstanding the same are ordinary articles of food and not injurious to health, and will destroy the market value of the product, and deny to the complainants within the jurisdiction of Ohio the equal protection of the laws. * * * This alleged wrong construction, when analyzed, amounts

to this: The complainants claim that their compound is not within the terms of the statute, the food commissioner wrongfully claims that it is. Upon this branch of the case the question is: May a court of equity entertain a bill to inquire into this matter, and if it finds that the complainant is right in its contention enjoin the food commissioner from instituting proceedings under the laws of Ohio? * * *

* * * "It seems clear that this action cannot be maintained consistently with the eleventh amendment to the Constitution, withholding the judicial power of the United States from suits in law or equity, commenced or prosecuted against one of the United States by the citizens of another State, or citizens or subjects of any foreign State. * * * This is virtually to enjoin the State from proceeding through its duly qualified and acting officers. If the food commissioner may be enjoined from instituting such prosecutions, why may not the prosecuting attorney or any officer of the State charged with the execution of the criminal laws of the State? While the State may not be sued, if the bill can be sustained against its officers it is as effectually prevented from proceeding to enforce its laws as it would be by an action directly against the State.

"We are now dealing with an officer of a State proceeding under a valid law of the State, and whose error lies in wrongfully construing the statute so as to include the complainants' product. To entertain the bill in this aspect would be to subvert the administration of the criminal law and deny the right of trial by jury by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. * * * Every citizen must submit to such accusations if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages. * * *

"It is further claimed that the act is unconstitutional as an interference with the right of Congress to regulate interstate commerce, and we are cited to Schollenberger *v.* Penn-

sylvania, 171 U. S., 1, in which a law of that State was held invalid to the extent that it prohibited the introduction of oleomargarine into the State from another State in original packages. The case was distinguished from the prior case of Plumley *v.* Massachusetts, 155 U. S., 461, in which the Supreme Court upheld a statute punishing the sale of oleomargarine when colored in imitation of butter. In other words, the Supreme Court held it to be within the power of the State to require an article of food to be sold for what it really is, and to protect the public from imposition in buying one article of food in the belief that it is another, but beyond the power of the State to prohibit the introduction and sale in original packages of a pure article sold upon its merits.

"As we read the Ohio statute it does not undertake to prohibit the introduction and sale of a pure article of food, sold for what it really is, but the coloring, coating or polishing of an article whereby damage or inferiority is concealed; the act providing in this connection that it shall not apply to mixtures or compounds recognized as ordinary articles of food, if every package sold or offered for sale be distinctly labeled as a mixture or compound, with the name and per cent. of each ingredient therein, and is not injurious to health. * * *

"But it is argued that coffee treated so as to make Ariosa is a pure article of food, and a compound labeled as required by the statute. Again the act is argued to be unconstitutional because of the construction put upon it by the food commissioner, and this 'construction' is his contention that Ariosa is coffee so coated as to conceal damage or inferiority, and that it is not a compound or mixture within the meaning of the statute. These are the very questions that the statute vests in the discretion of the commissioner as a preliminary matter in determining to institute prosecutions in the enforcement of the law which he is charged to execute, leaving the guilt or innocence of the party charged to be decided by the proper tribunals when prosecutions are instituted under the law. The constitutionality of the act is to be

determined by its language and purpose and not by the alleged wrongful institution of prosecutions thereunder against those guiltless of a violation of its provisions.

"Nor do we think that there is ground for injunction in the allegations of the bill that the food commissioner is publishing the fact that the product of the complainants is within the prohibition of the law. If this publication is made to those dealing in the article it would be within the duty of the commissioner, in advising of contemplated prosecutions; if such publications are libelous the law affords other means of redress.

"The fact that complainants' product is widely sold in Ohio, and many persons may be subject to prosecution, does not enlarge the jurisdiction of a court of equity to interfere by injunction to control prosecution for alleged violation of the laws of the State.

"We think this case comes within the principles settled by the Supreme Court in the cases above cited, and the Circuit Court did not err in dismissing the bill."

II.

Specification of errors relied upon.

It is submitted that the decree of the Circuit Court herein—as affirmed by the decree of the Circuit Court of Appeals from which this appeal is taken—was erroneous in that it ordered, adjudged and decreed that the bill of complaint herein and amendment thereto be dismissed; and in that it ordered, adjudged and decreed that defendant go without day; and in that it ordered, adjudged and decreed that defendant recover his costs herein; and in each of such particulars, so ordered, adjudicated and decreed.

In especial it is urged that the Circuit Court of Appeals erred:

1. In holding that this suit was, in effect, against the State of Ohio; hence one which under the

Eleventh Amendment of the Constitution of the United States, the Federal courts are without jurisdiction to entertain.

2. In holding that the statute of the State of Ohio in complainants' bill set forth (Sec. 4200–'6, R. S.) is constitutional and valid.

3. In holding that the Circuit Court was without jurisdiction to restrain the respondent.

4. In refusing to hold that the statute of the State of Ohio, set forth in complainants' bill (R. S., 4200–'6), as construed and threatened to be enforced by respondent, was unconstitutional and in conflict with the Fourteenth Amendment to the Constitution of the United States; and also unconstitutional as an interference with interstate commerce.

5. In refusing to find that Ariosa, being a mixture or compound, not injurious to health, and recognized as an ordinary article of food, *is within the exception*, and not within the prohibition, of the statute, and, therefore, not an adulteration in fact or in law.

6. In refusing to find that the Circuit Court had jurisdiction to restrain the respondent from stating or charging—

That Ariosa is adulterated; or

That complainants' process of coating and glazing set forth in the bill, is in violation of the statute of the State of Ohio, set forth in the bill (R. S., 4200–'6); or

That the importation into Ohio of said Ariosa, or the selling of or offering for sale the same, constitutes a violation of such statute; or

That any dealer possessing, offering for sale, or selling Ariosa glazed, as set forth in the bill, is in the possession of, offering for

sale, or selling an adulterated food product within the meaning of the statute of the State of Ohio (R. S., 4200-'6)

7. In refusing to find that the Circuit Court had jurisdiction to restrain the respondent from menacing or threatening any dealer in Ariosa, so glazed, with prosecution for having in possession, offering for sale, or selling, such Ariosa.

III.

BRIEF OF THE ARGUMENT.

No answer having been filed, the judgment of dismissal should be reversed, provided the complaint states facts sufficient, in any view of the case, to constitute a cause of action.

The only questions material here are, therefore:

First.—Have the Circuit Courts of the United States jurisdiction to entertain suits for such relief as is here demanded?

Second.—Does the bill set forth such a cause of action as to justify the intervention of a court having jurisdiction?

POINTS.

FIRST.—The Court had jurisdiction to entertain this suit and give the relief asked.

(1.) *Section 720 of the U. S. Revised Statutes has no application here.*

For when the bill herein was filed there had not been commenced any of the prosecutions threatened.

The point is too well settled in our favor to require or excuse argument. The precedents are well summed up in the following quotation from the opinion of the Court in *Rhodes Co.* v. *New Hampshire*, 70 Fed. Rep., 721:

> (723.) "This section (720) does not apply to proceedings, either criminal or civil, which have not in fact been commenced, but which are threatened by State officials. Mr. Justice Bradley in *Live-Stock Dealers' & Butchers' Assn* vs. *Crescent City Live Stock Landing & Slaughterhouse Co.*, 1 Abb. (U. S.), 388, 404, 407, Fed Cas. No. 8, 408, and Mr. Justice Blatchford in *Fisk* vs. *Railroad Co.*, 10 Blatchf., 518, Fed. Cas. No. 4, 830. A like distinction seems also to have been made by Judge Pardee in *Louisiana* vs. *Lagarde*, 60 Fed., 186, 193, and by Judge Sawyer in *Yick Wo* vs. *Crowley*, 26 Fed., 207. Therefore, if we had only this statutory provision to consider, we might find no difficulty in going to an injunction against criminal proceedings threatened, but not commenced when this bill was filed."

(2.) *This suit is not against the State of Ohio within the intendment of the Eleventh Amendment to the Constitution of the United States.*

> See *Scott* vs. *Donald*, *165 U. S. 58*, (*1897*).
>
> Also *Tindal* vs. *Wesley*, 167 U. S., 204, (1897).

—and the following later cases:

In *Western Union Tel. Co.* vs. *Myatt et al.*, 98 Fed. Rep., 335 (1899), the complainant, sued as a corporation and citizen of New York, to restrain enforcement against its officers and agents in Kansas by the Kansas State "Court of Visitation" of a statute, constituting refusal to comply with such Court's order, a misdemeanor, punishable by fine or imprisonment. And the Court said (p. 355):

> "In *Railway Co.* vs. *Dey* (*C. C.*), 35 Fed., 866-871, it was contended that the suit was

against the State, and, therefore, within the inhibition of the Eleventh Amendment to the Constitution. Upon this point Mr. Justice Brewer, then Circuit Judge, said: 'The defendants claim that they are simply attempting to carry into effect the mandates of the State as expressed in one of its laws; but if that law be unconstitutional it is no law, and they have no authority for their actions. This proceeding is a judicial inquiry to see whether they have authority for their actions; whether the law upon which they rely is valid and constitutional, *or sufficient to justify the actions which they are taking.*' * * * It is also contended by the defendants that this suit cannot be maintained because it is, in effect, an action against the State of Kansas, and, therefore, within the provisions of the Eleventh Amendment to the Federal Constitution; also that it is an effort to determine the constitutionality of a State enactment by the injunctive process of a Federal Court. In support of these contentions the case of *Fitts* vs. *McGhee*, 172 U S., 516, 19 Sup. Co., 269, is principally relied on. * * *

(p. 357): It seems to me to be clear that the doctrine announced in *Smyth* vs. *Ames*, and the preceding cases to the same effect was not modified by the decision in *Fitts* vs. *McGhee*, and it *is also clear that the case at bar is not a suit against the State of Kansas, within the meaning of the Eleventh Amendment to the Constitution.* It will be noticed that in the case at bar the defendants, * * * are specially charged with the enforcement of the State enactments under consideration, and that they are not otherwise general officers of the State, or charged with the enforcement of all laws generally."

" A suit to enjoin the officers of a State from enforcing an unconstitutional statute which subjects the complainant to a seizure of his property, and the closing of his place of business, for his failure to pay a license imposed by such statute, *is not an action against the State, within the meaning of the Eleventh Amendment to the Constitution, and is one*

of which a Federal Court of Equity has jurisdiction."

Also *Union Pac. R. Co.* v. *Alexander*, *113 Fed. Rep., 347* (1901).
Smyth v. *Ames*, *169 U. S., 466*, and
Prout v. *Starr*, *188 U. S., 537*,

especially the last named, where the Court says (p. 542):

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the several States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States (etc., etc.), all of which provisions existed before the adoption of the Eleventh Amendment, which still exists, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens by the passage of State laws disregarding these Constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry, whether the salutary provisions of the Fourteenth Amendment have been disregarded by State enactments."

And on both (1) and (2) above at once see:

Central Trust Co. vs. *Citizen's St. Ry. Co.*, 80 Fed. Rep., 218 (1897), (where on application, which, as the reported case shows, was advised and made by such conservative and capable counsel as Benjamin Harrison and W. H. H. Miller) in a case where criminal prosecutions were threatened by State authorities, under color of an invalid statute, for the purpose of compelling complainants to relinquish a property right, the Court ruled that the remedy in chancery was available, and that a preliminary injunction might properly issue, the following being

quoted from the opinion of Showalter, Circuit Judge (p. 225):

> "It is also contended that this suit cannot be maintained because the State is, in effect, a party defendant, and under the eleventh amendment to the National Constitution a State cannot be sued; and, further, that Section 720 of the Revised Statutes of the United States inhibits the relief prayed for in this bill as against defendants Wiltsie and the City of Indianapolis. But under the ruling of the Supreme Court of the United States in Pennoyer *v.* McConnaughty, 140 U. S., 1, 11 Sup. Ct., 699, and Reagan *v.* Trust Co., *supra*, this is not a suit against the State of Indiana, within the sense of the eleventh amendment, nor does it fall within the terms of Section 720. It is ordered that the injunction issue as prayed."

Before this Court, in this cause, can appear and be recognized as defendant only Joseph E. Blackburn, a natural person, whom complainants (also natural persons) ask to be enjoined from doing certain acts; each of which is of such a nature, that any citizen or other person in Ohio could do it; which respondent threatens, and which are alleged to be neither within his official capacity nor sanctioned by the statute under color of which he threatens to do what complainant asks the Court to forbid.

No complaint is made that the State of Ohio threatens to do, or can do any act, or that within his duties any official of that State, as such, can do it. On the contrary, the cause of action here consists of what -circumstances (including the Ohio statute quoted) being as they are -Joseph E. Blackburn, a citizen of Ohio, threatens to do.

Like any other citizen, he is entitled to such defense, as circumstances, including the Ohio statute, may furnish. If he pleads the statute, or if, as is the case here, the bill states its terms, and that the defendant falsely claims they justify his

statements, charges and threats complained of, then the Court must decide whether in fact such statute does constitute a defense for the acts complained of.

If it either (1) does not in fact do so, or (2)—if so construed as to do so—it is unconstitutional; then respondent's defense, based thereon, fails, and complainants are entitled to an injunction just as if no such statute existed. The construction and validity of the statute, and the construction and scope of the Constitution of the United States are thus at issue; but this issue is exclusively between these complainants and Joseph E. Blackburn.

As to criminal proceedings, it is not claimed or suggested that Blackburn is a district attorney or a committing magistrate, or that the Dairy and Food Commissioner can institute prosecutions in any other manner than that open to any other citizen, viz , by making such charge that the law has been violated as to set in motion the criminal procedure of the State.

Respondent's counsel seems entirely to misapprehend our position. Complainants here have no intent or wish to interfere with the normal enforcement of the criminal laws of the State of Ohio. They do not object to any other citizen of Ohio making any charge, however unfounded—whether such as respondent here threatens, or others—or instituting any number of prosecutions against any number of dealers, in respect of their sale or offering for sale of Ariosa. Indeed, complainants do not even object to defendant making such charges or instituting such prosecutions, if on other grounds than those, without foundation in fact or law, which they have set up in their bill. Their objection is not to *bona fide* criminal prosecutions, as such, or generally to the enforcement against any person or persons, of the law of Ohio—on whatever mistake of fact, however misconstrued, or however harshly administered.

On the contrary, their complaint is this: Setting

out facts, the conclusion from which is irresistible that the respondent is using threats and proposes to institute a multiplicity of unfounded prosecutions, as a factor of a scheme to attack complainants' business and destroy their property, it asks that this scheme, including this feature, be enjoined.

It is no answer to say that any one of thousands of others of citizens of Ohio can institute similar proceedings, that hundreds of officials, district attorneys, justices of the peace and others, may do so, or that it is therefore frivolous for complainants to ask that Blackburn alone be enjoined.

Complainants have no cause to fear acts by other citizens or officials of Ohio; no reason to impeach their motives; no ground upon which to ask that they be restrained. But they do have cause to object to the statements, they do impeach the motives, and they do fear the threats of respondent. By their bill they set forth the grounds upon which they are entitled to have him restrained from this wanton attack, not upon themselves (for he has not threatened to sue *them*), but *upon their business* as merchants—through prosecutions against others, in which only by chance can they secure any opportunity to defend their property. They ask that he shall be restrained, not because he is an official of the State of Ohio—though the repute thereby acquired makes his statements and charges more damaging and his threats more dangerous; not because, just as any other citizen of Ohio, he may institute a prosecution under the laws of that State against any one as to whom he shall make an appropriate charge; but because, as an individual, Joseph E. Blackburn, in his wanton attack on the property rights of complainants, has threatened, among other factors to that end, to institute unfounded prosecutions, against which the complainants cannot effectively defend themselves except by anticipation (as by this suit); and by the threat and

pendency of which they would be meanwhile irretrievably damaged.

In short our case is similar to but much stronger than that in *Louisiana* v. *Lagarde*, 60 Fed. Rep., 186 (1894), where, on objection by the State Commissioners of Agriculture that the injunction asked against them would be futile unless the district attorneys and other local officials were also enjoined, the Court said (p. 192):

Pardee, Circuit Judge:

> "It is not at all probable that the district attorneys of the State will constitute themselves inspectors of fertilizers, or Agents of the Board of Agriculture, and in that way attempt to harass complainants, while it is more than probable that any and all proceedings, civil or criminal, instituted against the complainants for non-compliance with the Act in question, will be instigated, instituted, and prosecuted only through the Board of Agriculture, its members, officers, agents, and attorneys. *There can be no doubt about the power of the Courts to issue an injunction running to those persons, restraining their action as prayed for in the bill; and * * * such injunction may issue, but not to interfere with the prosecution of any suits, civil or criminal, commenced before the filing of this bill.*"

Again:

The Circuit Court of Appeals was mistaken in its assumption (Rec., p. 88):

> "These" (questions as to proper construction of the Ohio statute) "are the very questions that the statute vests in the discretion of the Commissioner, as a preliminary matter in determining to institute prosecutions in the enforcement of the law which he is charged to execute."

For, not merely would a statute giving any person—official or private—discretion as to the construction of a law be obviously void; but in fact the Ohio

statute neither attempts this nor imposes upon the Ohio Dairy and Food Commissioner any such duty as raises this question.

The nearest approaches thereto are in the clauses:

> "He" (the Dairy and Food Commissioner) "shall be charged with the enforcement of all "laws against fraud and adulteration or impu- "rities in foods, drinks or drugs, and unlawful "labelling in the State of Ohio." * * *
>
> The Dairy and Food Commissioner is also authorized "to prosecute or cause to be "prosecuted any person * * * engaged in "the manufacture or sale of any adulterated "article of food or drink * * * in violation "of, or contrary to, the laws of the State of "Ohio."
>
> Laws of O. (Bates' Ed.), Title III., Ch. 18, Secs. 409–7 and 8.

The only duties specifically imposed upon the Commissioner by the statute are those of inspection, and

> "The" (Dairy and Food) "Commissioner "shall make an annual report to the Governor, "on or before the 15th day of November of "each year, containing itemized statements of "all receipts and disbursements, attorneys' "fees in each specified suit brought in this "department, and all persons employed by "him, together with such statistics and other "matter as he may regard or value" –

which well illustrates how *aliunde* here is the suggestion of the Circuit Court of Appeals.

For example: If it were attempted to enjoin the Commissioner from including in his report certain statistics that he claimed to regard of value, the question might arise how far the express direction of the statute would make such matter privileged. But when (as is the case with reference to all other matters than his duty to inspect and to make this annual report to the Governor) the statute merely directs him to enforce the law, it certainly cannot give, or even infer, any

other immunity than that to which every citizen is always entitled—protection against legal attack for doing whatever valid law requires or authorizes.

As to the statements, letters and circulars complained of, the bill shows them to have been given out in February, 1901; they are not suggested to have had any connection with any such report; and on their face they are ephemeral and not a part of any such document. In short, the case here is the simplest possible example of that referred to by the opinion of the Court in *R. R. Co.* v. *Dey, 35 Fed. Rep., 866 (871).*

> "This proceeding is a judicial inquiry to see whether they" (State officials) "have authority for their actions; whether the law on which they rely is valid and constitutional, *or sufficient to justify the action which they are taking.*"

—And the case on this point is as nearly as may be that passed upon in *Union Pac. R. R. Co.* v. *Alexander, 113 Fed. Rep., 347* (1901)—of which see head note and opinion.

> (Court, at p. 350.) "In this case no act of political administration is challenged, no contract of the state is involved, and no judgment can be rendered which affects it as a corporate entity. It is affected and interested only as it is interested and affected by the welfare of its citizens. The legislation involved is governmental in its nature, not contractual. No obligation that the state has entered into, no contract or promise that it has made is questioned. *The bill rests solely upon the proposition that the property rights of the complainants are involved by the threatened actions of the defendants, and this is a judicial inquiry to see whether they have authority for their actions,—whether the law upon which they rely is valid and constitutional, or* **sufficient to justify the action which they are taking.**

So far as concerns any claim that—in instituting prosecutions, issuing volunteer statements or circulars as to complainant's property, &c., &c.—the Dairy and Food Commissioner of Ohio is a judicial officer whose discretion is protected against intervention by Federal courts, the latest authorities are explicit to the effect that, even if the State had expressly directed the acts complained of, and had formally clothed the Commissioner with judicial power, he (such Commissioner) would have been held not entitled to protection in the mistaken exercise of that discretion, but would be considered as a ministerial officer, subject to the equity jurisdiction of the Federal courts. See:

Louisville & N. R. Co. v. *Brown et al., 123 Fed. Rep., 946.*

Pardee, Circuit Judge:

(947) "The bill, which is skillfully drawn, sets forth that the Railroad Commission of the State of Florida has ordered a reduction in the prospective rates of carrying passengers on the complainants' railroads situated in the State of Florida, and has ordered complainant to observe said reduced rates under very severe pains and penalties imposed by the law of the State of Florida. The bill and exhibits submitted by the complainant on this hearing decidedly support the contention of the complainant, and show a case wherein, on general principles, the complainant is entitled to relief. The Court has general jurisdiction of the case by reason of the diverse citizenship of the parties and from the constitutional questions involved; and it has jurisdiction in equity by reason of the inadequacy of all remedies at law and to prevent a multiplicity of suits, which would result if the complainant should ignore the alleged illegal orders of the commission, and attempt to stand upon its alleged rights in the premises.

"In the demurrer and answer to the bill, the latter being taken as an affidavit, many objections to the right of the complainant to an injunction are urged, and in the briefs they are

elaborated with great skill and ingenuity. The main contention of the respondents is that as the legislative act which creates and defines the powers and authority of the railroad commission vests in the said commission 'judicial powers to do or enforce or perform any function, duty or power conferred upon them by the act to the exercise of which judicial power is necessary,' the said commission, in performing the various powers and duties vested in the commissioners by the act, is a State court, within the meaning of section 720 of the Revised Statutes of the United States (U. S. Comp. St., 1901, p. 581), which prohibits any court of the United States from issuing an injunction restraining proceedings in any court of a State. An inspection of the act of the Legislature of the State of Florida creating the railroad commission shows that, as is usual in such cases, the commission is vested with executive, legislative, and *quasi* judicial powers, but does not show that the commission is to any degree created and established as a court for the final adjudication and determination of the rights of individuals or the rights of property. Whatever may be the act, order, or proceeding of the commission, whether of an executive, legislative, or *quasi* judicial character, the commission's findings are only *prima facie* determined, and can only be enforced in the courts; and in every instance the rights of individuals or the rights of property concerned can be re-examined and determined in the regular course. But be that as it may, it is clear from the act as a whole that the judicial powers conferred by the act are *quoad* judicial acts to be performed by the commission, and were not intended to extend to the performance of any act of the legislative powers conferred upon the commission.

"It seems to be well settled that the power to fix the future rates is legislative, and not judicial (Interstate Commerce Commission *v.* Cincinnati, N. O. & T. &. P. R. R. Co., 167 U. S., 499; 17 Sup. Ct., 896; 42 L. Ed., 243); and therefore it may be assumed as beyond question that the Florida railroad commission, in regulating and reducing the future rates of passen-

ger fares to be charged and collected by the Louisville & Nashville Railroad Company on its lines in the State of Florida, acted in a legislative capacity, and that with regard to enforcing the said reduction the commission is given no judicial powers, being limited, under the statute creating the commission, to the institution of proceedings, or the direction of the same, in the regular courts. For an interesting discussion of these matters, see Western Union Telegraph Co. *v.* Myatt (C. C.) 98 Fed., 341, 342, and State *ex rel. v.* Johnson (Kan. Sup.), 60 Pac., 1060; 49 L. R. A., 662."

(3.) *In defense of* ***property*** *rights, and when justified by equitable considerations, courts of equity may enjoin criminal prosecution.*

For more than a hundred years it has been perfectly well established that in proper cases equity would restrain a plaintiff in its forum from proceeding at the same time in criminal courts against another party to the proceeding in equity. And for more than fifty years injunctions have been regularly issued against criminal acts—and criminal prosecutions—*whenever such injunction was necessary to protect property rights.*

In *Turner* vs. *Turner*, Jurist, 15, Part I., 218 (1851), agents of a receiver, acting under leave of Court, took forcible possession of a house occupied by servants of the defendant, who preferred a bill indictment against the solicitor, builder and workmen, who had forcibly entered. Held, that the Court would enjoin proceeding on indictment.

Lord Cranworth, *V. C.*: "I shall certainly make an order restraining the defendant from prosecuting the indictment. The distinction is very intelligible, this Court has no jurisdiction over an indictment in general, as over a mere civil procedure, but this is merely with respect to its own jurisdiction."

"When a petition has been presented for winding up a company, all criminal proceed-

ings against the company may be restrained by injunction" (*re* Briton, Medical and General, 32 Ch. Div., 563).

Snell, Principles of Equity (12th Ed.), 648 (Lond., 1898).

"If, however, the act concerning which an "arrest or criminal procedure is threatened "affects civil *property and its enjoyment, then* "*in protecting the property rights, equity may* "*properly enjoin the criminal prosecution.* "But in such case its interference is founded "solely upon the ground of injury to property "and the necessity of preserving property "rights."

High on Injunction (Ed. 1890), Sec. 68.

The authority of those assertions of the scope of equity relief and declaration of principle on which it depended, has never been questioned, but, on the contrary, confirmed by unbroken line of precedent.

Directly in support of the general power of a court of equity *to restrain criminal prosecutions* in cases much less urgent than the present one, are—

Lord Auckland vs *Westminster Local Board of Works*, L. R. Ch. App. Cas. VII., 597 (1872).

(600) "* * * The District Board having threatened to put their powers in force against the plaintiff if he proceeded to build beyond the line laid down by the architect of the Metropolitan Board, the plaintiff filed the present bill, in which he prayed that the order of the superintending architect might be declared to be invalid, *and that the District Board might be restrained* from interfering with the erection of the proposed buildings by the plaintiff, and *from recovering any penalties in respect thereof.*"

"*I am of opinion that the order of the Vice-Chancellor granting an injunction is perfectly right.*

"The District Board threaten that, if Lord

> Auckland should erect stables on this land, they will pull them down. It is true that they must first go before a magistrate. If they do so he will probably tell them that he has no jurisdiction, for it seems to me perfectly clear that he has no jurisdiction under this section. But I think Lord Auckland is entitled to say, 'I will not wait to see whether a magistrate will decide rightly or wrongly as to his jurisdiction in this case; I will not go before a magistrate at all, but I will go into the Court of Chancery for an injunction to restrain you from pulling down my stables in a case where you have no power to pull them down.'"
>
> *Idem*, 670 (Sir A. Mellish, *L. J.*).

This case has not merely remained unshaken, but established by the very cases which have been most frequently misquoted as authorities for a contrary rule.

In America among the earlier reported cases is *Atlanta* vs. *Gate City Gas Light Co.*, 71 Ga., 106 (1883). In this case, under an *erroneous opinion of their rights*, the Mayor and City Engineer of Atlanta threatened to arrest the gas company's employees, under claim that they violated a city ordinance against obstructing streets without a permit, in case they proceeded in the usual and proper way to put down mains in streets, a permit having been refused.

An injunction was prayed for restraining the City and its officials from interfering with the Gas Company's rights *by arrest or otherwise*.

In delivering its opinion, affirming the judgment of the Court below granting an injunction, the Court said:

> "If the charge be of a criminal nature or offense against the public, and does not touch the enjoyment of property, then a court of equity should not interpose by injunction. On the other hand, when it is manifest, as in this case, that a prosecution and arrest is threatened for an alleged viola-

> tion of city ordinances, for the sole purpose of preventing the exercise of civil rights, directly conferred by law, injunction is a proper remedy to prevent injury to the party thus menaced. * * * To arrest the employees of complainants for laying down pipes and erecting posts along the streets of Atlanta, we are satisfied would be a misapplication of the city ordinances, wisely established to prevent wanton and unlawful injury to such streets, &c., and the obstruction of the same" *Injunction order affirmed.*

In *Port of Mobile* vs. *L. & N. R. R. Co.*, 84 Ala., 115 (1887), a bill was filed by the L. & N. Railroad Company *vs.* The Port of Mobile, to enjoin the enforcement of an ordinance of that municipality which declared it unlawful for any person or corporation to load or unload cars in the public streets of the city, under a penalty of not less than $25 for each and every violation.

Plaintiff alleged a vested franchise to load and unload freight on Commerce street, and use thereunder for forty years; that the ordinance in question was void; that defendants' employees were threatened with arrest; also multiplicity of suits; irreparable damage, inadequacy of law, &c.

The Court found as alleged, and added—

> (125) "*The suggestion that the Court, under the peculiar circumstances of this case, must abdicate its jurisdiction because of the fact that it is dealing with an ordinance of a municipal corporation of a quasi-criminal character, the violation of which is made an offense, does not strike me favorably.* The power to prevent irreparable injury flowing from the deficiency and injustice of the more technical rules of the common law, may be said to be the very life of equity jurisdiction. The Court must, therefore, be jealous of its power, notwithstanding it may also be cautious in its exercise." Injunction granted.

Above approved and followed in a similar case, *Birmingham* vs. *Alabama, G. S. R. R. Co.*, 98 Ala.,

134, and conceded to be authority (though distinguished) in *N. C. & St. L. R. R.* vs. *Attala*, 118 Ala, 362 (license fee case), where the Court held equities not sufficiently strong.

See also *Dinsmore* v. *N. Y. Board of Police, 12 Abb. N. C., 436* (N. Y., 1882), where it was ruled that a court of equity has power to grant an injunction in an action against the Board of Police of the City of New York, a corporation, to restrain them from interfering with the necessary operations and business of an express company engaged in the business of interstate commerce, even though a law of the State of New York prohibits any such operations and business on Sunday, and such interference was pursuant to such law.

And *Manhattan Iron Works Co.* v. *French, 12 Abb. N. C., 446* (N. Y., 1882) which holds that a court of equity has power in aproper action to enjoin the police authority of the State from interfering with the business and property of a manufacturer engaged in continuing the business of manufacturing on Sunday, even though such interference was under color of a statute of New York, if it appear that such manufacturing business cannot be discontinued on Sunday without destruction of property, or irreparable loss and damage thereto.

> (Court at p. 450): "The only question raised by the corporation counsel in this case is the power of this court to enjoin the defendants. He contends that the proper course for plaintiff is to submit to the arrest of its servants, defend them before a magistrate, and if convicted, sue out a writ of *habeas corpus;* and he further contends that this court has no jurisdiction. If this court has no equity jurisdiction in this case and this injunction is consequently denied, the presumption is that the defendants will execute their threats. Let us contemplate a possible result in that event. The men are arrested and held by the magistrate, on *habeas*

> *corpus* the prisoners are remanded, on review the convictions are affirmed, and on writ of error to the court of appeals they are reversed. In the meantime the furnace has chilled, that is the molten mass, for want of fuel, has become solidified so that the iron, the flux, the fire brick are all bound together in one indivisible mass. This is a matter so serious that it costs $40,000 to remedy. But this is not all; the furnaces have to stand idle during the pending of the appeal, the skilled labor employed has been scattered, and the contracts unfulfilled that have been previously made and for which heavy damages have been incurred. In a word, the plaintiff has been ruined. For all this it has no redress. The defendants as public officers acting under the law assume no responsibility for their conduct. And yet the courts cannot interfere is the assertion of the learned corporation counsel. If this is true, it is a blot upon the administration of justice. If it is true, however, the courts must so declare and leave the redress to the Legislature.
>
> * * * * * *

After distinguishing cases cited by defendants Court concludes (p. 451):

> "These cases are clearly distinguishable from the case at bar. They are all against the person. Injunction never lies to restrain the police authorities from arrests for crimes charged against persons, as is shown by the last two cases above cited, nor does it lie against the method of doing a particular business, as in the case first above cited. Here, however, the proposed action of the police is *against the prosecution of this business*, no matter in what form it may be done."

and sustained the injunction.

(4.) ***This jurisdiction has been frequently exercised by the Federal courts in restraint of State officials (as well as others) from both civil and criminal prosecutions in State (as well as other) courts.***

The following—

Central Trust Co. v. *Citizens' S. R. Co., 80 Fed. Rep., 218;*
Western Union Tel. Co. v. *Myall, 98 Fed. Rep., 335;*
Minneapolis Brewing Co. v. *McGillivray, 104 Fed. Rep., 258;*
U. P. R. R. Co. v. *Alexander, 113 Fed. Rep., 347;*
L. & N. R. Co. v. *Brown, 123 Fed. Rep., 946;*
Tindal v. *Wesley, 167 U. S., 204;*

all *supra*, are authority on this point as well. In addition we note:

In *State of Louisiana* vs. *Lagarde et al.*, 60 Fed. Rep., 186 (1894), an injunction was asked on cross-bill filed by the defendants, soliciting agents of The Thompson & Edwards Fertilizing Company, a corporation of Illinois, manufacturing fertilizers outside of Louisiana, but importing them into that State in original packages, in response to orders from parties there, against unjustifiable interference by the Louisiana Commissioner of Agriculture, and his inspectors, by civil and criminal suits and prosecutions against dealers in such fertilizers within the State. In its opinion the Court said:

> (192.) " There is only one serious question as to the scope of the injunction that ought to be issued, and that is whether a Court of Equity can enjoin the law officers of the State from instituting and prosecuting criminal suits or proceedings under a void or unconstitutional law. * * * There is only one section of the Act in question that in any way calls for or requires the district attorneys of the State, as such, to institute criminal proceedings against the complainants, even if complainants' business should be construed as being within the Act; and that section relates to cases where complainants shall be charged with selling, or offering to sell, any package

of commercial fertilizer which has not been tagged as provided in the act. It is not at all probable that the district attorneys of the State will constitute themselves inspectors of fertilizers, or agents of the Board of Agriculture, and in that way attempt to harass complainants, while it is more than probable that any and all proceedings, civil or criminal, instituted against the complainants for noncompliance with the act in question, will be instigated, instituted and prosecuted only through the Board of Agriculture, its members, officers, agents and attorneys. *There can be no doubt about the power of the Court to issue an injunction running to those persons, restraining their action as prayed for in the bill; and * * * such injunction may issue, but not to interfere with the prosecution of any suits, civil or criminal, commenced before the filing of this bill.*"

In *Donald* vs. *Scott et al.*, 67 Fed. Rep, 854 (1895) (affirmed in this Court *sub nomine Scott* v. *Donald*, 165 U. S., 58).

Simonton, Circuit Judge:

(855.) "This is a bill against the defendants, the State constables of the State of South Carolina. The bill states: That the complainant is a citizen of the United States and of the State of South Carolina, and was the owner of certain packages of alcoholic liquor, to wit: One barrel of Rochester beer, made in the State of New York, and shipped to him by ocean and land routes to the city of Charleston, his place of residence, &c. * * * None of them contained any product of the State of South Carolina, but their contents were products of other states of the union. That each package was openly marked in his name. That upon the arrival of each of the same packages at Charleston, its destination, it was forcibly seized by the defendants, claiming to act as State Constables, and taken and carried away by them, under the pretense of authority of the Act of the General Assembly of South Carolina, approved Jan-

> uary 2, 1895, commonly known as the 'Dispensary Law.' * * *
>
> "That upon each seizure, and after demand and refusal, he brought his action for the unlawful trespass on his rights by the defendants; and that, notwithstanding this, they persist therein, and manifestly propose to drive him to a multiplicity of suits. That he has no adequate remedy at law for these repeated violations of his rights, as the defendants are notoriously insolvent and pecuniarily irresponsible He avers that so much of the dispensary law as is set up in justification of these acts of the defendants in preventing him from importing for his own use and consumption alcoholic liquors, the products of other states, into this state, violates the Interstate Commerce Law as established by the Constitution and laws of the United States, and is null and void."

—and granted the injunction asked.

In *Wong Wai* vs. *Williamson et al.*, 103 Fed-Rep., 1 (1900). in the Circuit Court, Northern District of California, Morrow, Circuit Judge, Hawley and De Haven, District Judges, unanimously held that a Federal court of equity might properly grant an injunction against the Board of Health of the City of San Francisco.

Quoting from the syllabus—

> "A court of equity may properly grant an injunction restraining health officers of the United States *or of a city* from imposing or enforcing unlawful restrictions upon the right of a complainant, and others for whom he sues, to travel or to leave the city in which they are, in the pursuit of their lawful business, where such right has a pecuniary value, and the enforcement of the restrictions complained of will result in irreparable loss and injury to the complainants."

In *Jew Ho* vs. *Williamson*, 103 Fed. Rep., 10 (1900), a similar case, the Court held—

MORROW, Circuit Judge:

(21.) "As I had occasion to say in the former case [*Wong Wai* vs. *Williamson* (C. C.), 103 Fed., 1], this Court will, of course, uphold any reasonable regulation that may be imposed for the purpose of protecting the people of the city from the invasion of epidemic disease. * * * But is the regulation in this case a reasonable one? Is it a proper regulation, directed to accomplish the purpose that appears to have been in view? That is a question for this Court to determine. * * *

(23.) So, upon that ground, the Court must hold that this quarantine is not a reasonable regulation to accomplish the purposes sought. It is not in harmony with the declared purpose of the Board of Health or of the Board of Supervisors."

"But there is still another feature of this case that has been called to the attention of the Court, and that is its discriminating character; that is to say, it is said that this quarantine discriminates against the Chinese population of this city (citing *Yick Wo* vs. *Hopkins*, 118 U. S., 356). 'Though the law itself be fair on its face and impartial in appearance, *yet, if it is applied and administered by public authority with an evil eye and an unequal hand*, so as practically to make unjust and illegal discriminations, between persons of similar circumstances, material to their rights, the denial of equal justice *is still within the prohibition of the Constitution.*'

(26) "It follows from the remarks that I have made that this quarantine cannot be continued, by reason of the fact that it is unreasonable, unjust and oppressive, and, therefore, contrary to the laws limiting the police powers of the state and municipality in such matters; and, second, that it is discriminating in its character, and is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States."

And an injunction here was issued on application of complainant, Jew Ho, to prevent interference by the defendants, the Board of Health of the City of San Francisco, with his business as a grocer, etc., *restraining them from requiring complainant and others to submit to inoculation, or, in default of such submission, from imprisoning, restraining, or confining complainant and others*, and from interfering with or restraining complainant and others in exercise of their personal liberty, it being shown enforcement of the health regulation thus complained of would result in irreparable pecuniary loss and injury to complainants *in respect of their lawful business.*

On this point, see also *Central Trust Co.* v. *Citizens' St. R. Co.*, 80 Fed. Rep., 218 (1897), already cited on another point.

> (At p. 225, SHOWALTER, Circuit Judge.) "Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie, the District-Attorney, since its purpose is to restrain him from instituting criminal prosecutions under color of the amendment of 1897. But this complainant is seeking to protect a property right, and it seems to be law that when such prosecutions are threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available. Reagan *v.* Trust Co., 154 U. S., 362, 14 Sup. Ct., 1047, and Lottery Co. *v.* Fitzpatrick, 3 Woods, 222; Fed. Cas., No. 8,541, in each of which apprehended criminal prosecutions were enjoined, are to the point. Even in the case of Sawyer, 124 U. S., 200, 8 Sup. Ct., 482, cited by the Attorney-General, the rule as here stated is plainly recognized; nor do I find it disputed in any case."
>
> And see *Southern Exp. Co.* v. *Mayor, &c., of Ensley*, 116 Fed. Rep., 756 (1902).

JONES, District Judge (758). "The right of the express company to do interstate business at Ensley is the very marrow of the contention here. The company by its bill says to the city: You have no right to meddle with my business. We ask the protection of the court to carry on our business in spite of the city. The city by its demurrer says to the company: The city has power to regulate and tax your right to do business. If you do not pay for the right, you shall not carry on business at all. Any decree on the merits of necessity settles these irreconcilable claims as to the right to do business. Inevitably the decree must determine the validity of the express company's claim of unrestricted right to do interstate business at Ensley. If the express company has that right, the bill must be retained, and the city authorities enjoined. If it has no such right, the bill must be dismissed, and the city authorities allowed to have their way. The extent of the particular burden is of no moment so long as there is a denial of any power to interfere with the business at all. The right to do business lies at the root of the whole controversy, and accompanies every phase of the contention. What is the value of the right? What is the amount of injury which complainant may sustain from the meddling with it? The allegations of the bill are that the value of the express company's right to do interstate business at Ensley, and the injury done to the express company's business by the arrests of its agent, would exceed $2,000. Clearly the controversy involves a value or amount within the jurisdiction. Complainant is seeking to enforce a right which is worth more than $2,000 to it, and to prevent damage threatened to an amount in excess of $2,000. * * *

4. The necessities of this case do not require much discussion of the power of a court of equity to stay or enjoin criminal prosecutions. It is to be borne in mind that the power of the State, much less of its municipal authorities, cannot extend to regulating interstate commerce.

(At p. 761.) "5. The ordinance here in question is a palpable violation of the constitution.

If the municipal authorities who are engaged in enforcing this ordinance are otherwise amenable to preventive remedies of a court of equity, upon what principle of law or morals can they evade the jurisdiction, because to the usurpation of power in passing the ordinance is added the further defiance of the constitution, by declaring resistance to the ordinance a penal offense against society and punishing it accordingly? The fact that the city officers in making the arrests were themselves trespassers, and violators of the law of the land, using the physical power of the city to effect these arrests, can in no way affect the jurisdiction of this Court, if a case is otherwise made out which justifies injunctive relief against them (Osborn *v.* Bank, 9 Wheat., 738; 6 L. Ed., 204; Davis *v.* Gray, 16 Wall., 203, 21 L. Ed., 447; *In re* Debs, 158 U. S., 564; 15 Sup. Ct., 900; 39 L. Ed., 1092; City Council of Montgomery *v.* Louisville & N. R. Co., 84 Ala., 130; 4 South., 626; Port of Mobile *v.* Louisville & N. R. Co., 84 Ala., 116; 4 South., 106; 5 Am. St. Rep., 342).

Also *Wallace* v. *Ark. Cent. R. Co., 118 Fed. Rep., 422* (1902):

(423.) "Thayer, Circuit Judge. The record in this case discloses that the Arkansas Central Railroad Company, the appellee, filed a bill against Jeremiah G. Wallace, Felix M. Hanley, and Henry W. Wells, composing the Board of Railroad Commissioners of the State of Arkansas, whereby it prayed for an injunction restraining said Board of Railroad Commissioners from putting in force a certain freight tariff applicable to certain railroads in the State of Arkansas, which, by an order of the board, had been adopted and made effective as of August 2, 1900, and declared to supersede all other tariffs then in effect on said railroads. Besides, asking for an injunction restraining the commission from putting this tariff in force, the railroad company also asked for an injunction restraining the Commissioners from instituting any suits against the complainant for the recovery of any penalties under the laws of the State by virtue of the fact that the complainant

had not adopted and made such rates effective on its road as it was ordered to do."

"The decree of the lower court was clearly right under repeated decisions of the Supreme Court of the United States holding that a State law or regulation establishing rates for the transportation of persons or property, such as will not admit of the carrier earning such compensation as under all the circumstances of the case is just to it and the public, operates to deprive the company of its property without due process of law, and to deny to it the equal protection of the law, in violation of the fourteenth amendment to the Federal Constitution (Smyth *v.* Ames, 169 U. S., 466, 522, 523; 18 Sup. Ct., 418; 42 L. Ed., 819; Reagan *v.* Trust Co., 154 U. S., 362; 14 Sup. Ct., 1047; 38 L. Ed., 1014)."

(5.) *In late cases this (Supreme) Court has fully sustained such jurisdiction on every ground urged here.*

Smyth vs *Ames*, 169 U. S., 466 (1898).

In this case the Supreme Court of the United States affirmed a series of identical decrees of the United States Circuit Court for the District of Nebraska, perpetually enjoining certain railroad companies from making reduced rate schedules, as prescribed by a statute of Nebraska; and restraining the Nebraska State Board of Transportation from hearing or deciding any complaint against said companies under such Act; *or from instituting or prosecuting any action or proceeding for violation of said Act.*

By the injunction here sustained, the Nebraska State Board of Transportation, its members, and secretaries, were restrained

(477) "from instituting or prosecuting, or causing to be instituted or prosecuted any action or proceeding, civil *or criminal*, against either of said companies, &c., for any act or thing done, suffered, or omitted, which may be for-

bidden or commanded by said Act"; and *the Attorney-General of the State was also enjoined "from bringing, or causing to be brought, any proceeding* by way of injunction, mandamus, civil action or *indictment*, against said companies, or either of them," &c.

In the opinion, Justice Harlan says:

(478) "The present appeals were prosecuted by the defendants constituting the State Board of Transportation, as well as by the defendants who are secretaries of that board.

"* * * * It was contended that the plaintiffs had an adequate remedy at law, and that the Circuit Court of the United States, sitting in equity, was therefore without jurisdiction. * * *

(517.) "In these cases the plaintiffs, stockholders in the corporation named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which, in the federal system, distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable, not only to individual persons for every act, matter, or thing prohibited by the statute, and for every omission to do any act, matter, or thing required to be done, but to a fine of from one thousand to fine thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offense, from ten thousand to twenty thousand dollars for the third offense, and twenty-five thousand dollars for each subsequent offense. * * *

"Another question of a preliminary character must be here noticed. The answer of the officers of the State in each case insists that the real party in interest is the State, and that these suits are, in effect, suits against the State, of which the Circuit Court of the United States cannot take jurisdiction, consistently with the Eleventh Amendment of the Constitution of the

> United States. * * * But to prevent misapprehension, we add that within the meaning of the Eleventh Amendment of the Constitution, the suits are not against the State, but against certain individuals charged with the administration of a State enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment." (Cases cited.)

The Court thereupon proceeds, holding that the State Act in question is unconstitutional in that it would deprive the plaintiffs of their property without due process of law; would deny the plaintiffs the equal protection of law, and, *without dissent, affirms in toto the decree of injunction in each of the cases involved.*

It is true that in Smyth *v.* Ames the claim that Federal courts lack *jurisdiction* to enjoin criminal proceedings in a State was not specially argued and separately passed upon by this (Supreme) Court. This however, was done in *Prout* v. *Starr*, 188 U. S., 537. (At p. 542) Mr. Justice Shiras delivered the opinion of this Court. * * *

> "But by this appeal we are asked to declare that the Circuit Court had no jurisdiction, because it appears on the face of the bill that the complaint is essentially against the State of Nebraska, and is in contravention of the Eleventh Amendment of the Constitution of the United States.
>
> It is a sufficient answer to this contention that it was made, considered and determined in Smyth *v.* Ames. In the opinion in that case it was said:
>
> 'Within the meaning of the eleventh amendment of the Constitution, these suits are not against the State, but against certain individuals charged with the administration of a State en-

actment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this Court that a suit against individuals for the purpose of preventing them, as officers of a State, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment (Pennoyer *v.* McConnaughty, 140 U. S., 1, 10; *in re* Tyler, 149 U. S., 164, 190; Scott *v.* Donald, 165 U. S., 58, 68; Tindal *v.* Wesley, 167 U. S., 204, 220.'

"The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing a bill of attainder, *ex post facto* law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exists, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of State laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by State enactments."

(At p. 544.) "It is further argued by the appellant, as one of the grounds of his demurrer, that he was complained against in his official capacity as Attorney General of the State of Nebraska, and not in his individual capacity as a citizen thereof, and that the attorney-general of a State cannot be restrained by an injunc-

tion of a United States Court from enforcing the criminal laws of the State.

This, we think, is only another phase of the same question.

It is true that the defendant was included in the bill as the Attorney-General of the State, but that was because he was one of the board of transportation, which was directed to enforce the provisions of the act. The bill did not seek to interfere with the acts of the Attorney-General in prosecuting offenders against the valid criminal laws of the State, but its object was to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void. The injunction must be so read and understood."

As applied to our case this decision would read:

"The bill does not seek to interfere with the acts of the Dairy and Food Commissioner in prosecuting offenders against the criminal laws of the State, but the object was to prevent him from instituting prosecutions under statutory construction by him, judicially determined to be erroneous," (as per *White* v. *Ohio* below.)

SECOND.—The bill sets forth causes of action justifying the relief asked.

(*1.*) *Defendants' circulars and threats of prosecution are in themselves cause of action.*

Among the allegations of the bill are:

"XI.—The respondent herein, Joseph E. Blackburn, dairy and food commissioner as aforesaid, without authority of law, and falsely and erroneously construing the provisions of said statutes above set forth, notwithstanding the fact that the process used in the manufacture of the said compound or mixture known as Ariosa is

not in violation of the said statute and that the said statute is not applicable to the premises, and that there is no law of the State of Ohio warranting his acts hereinafter set forth, and further notwithstanding the healthful character of said Ariosa, the benefits accruing to the consumers thereof by reason of the aforesaid process used in its manufacture, and the fact that the use of said process, its objects and effect, and the ingredients and formula thereof, are plainly and expressly stated, printed and advertised upon each package thereof, both personally and through his agents, has heretofore, does now and will unless restrained by the order of this Honorable Court, continue to widely advertise, give out and state that said process used in the manufacture of said Ariosa, is within the prohibition of, and in violation of, the aforesaid statute (Rec., pp. 6 and 7).

"XII.—Respondent has menaced and threatened with prosecution, and still menaces and threatens to prosecute dealers in, and vendors of, said Ariosa within Ohio, for a violation of the aforesaid statute, and as complainants verily believe, will, unless restrained therefrom by the order of this Honorable Court, institute a large number of prosecutions against such dealers in and vendors of said Ariosa, upon the wrongful and erroneous charge that the treatment of said Ariosa by the process above described is a violation of the statute aforesaid, and that said Ariosa is an adulterated food product within the said statute and the prohibition thereof. By reason of the aforesaid official capacity of the said respondent, and the fact that he claims to act under the said statute intended to prevent the adulteration of food products, said respondent's statements and threats of prosecution have led, do lead, and will hereafter continue to lead, the dealers in, and consumers of, said Ariosa throughout the United States and more particularly in Ohio, to doubt the healthful character and proper preparation of the said food product and the integrity of the complainants, as manufacturers thereof, and have deterred, do deter and will hereafter deter, both wholesale and retail dealers and consumers in Ohio and elsewhere from purchasing, vending

or using Ariosa, thereby greatly decreasing the repute and sale thereof, to the great and irremediable damage of complainants, the decrease in market value of the stocks of Ariosa, already manufactured and in the possession of the complainants, and of the aforesaid dealers and vendors thereof, and the great impairment of the good will of the aforesaid business of complainants (Record, p. 7).

"XIII.—On or about the fifth day of February, 1901, said respondent, in pursuance of his wrongful, erroneous and unlawful construction of the statute aforesaid, and without any authority of law therefor, and as complainants are informed and believes for the purpose of intimidating the customers of the complainants and deterring them from purchasing or dealing in said Ariosa, issued, or caused to be issued, over his signature, to dealers in and vendors of, Ariosa, and others, within Ohio, a certain circular letter or statement in the words and figures following, to wit:

"'STATE OF OHIO,

"'OFFICE OF DAIRY AND FOOD COMMISSIONER.

"'DEAR SIRS: Replying to your inquiry about the Coffee situation, would say that this matter is now under consideration and investigation by the chemists of this department. As soon as conclusions are reached, a circular notice will be sent to all the jobbers in Ohio, and a sufficient number will be furnished to supply all their salesmen.

"'I might say that the following firms have agreed to accept the law as construed by this department: Andrus, Scofield & Co., Columbus; Dayton Spice Mills, Dayton; Woolson Spice Co., Toledo.

"'W. F. McLaughlin & Co., of Chicago, have agreed to comply with the laws as soon as construed by the Court.

"'The only firm that has refused, and still refuses to accept the ruling of this department, or abide by the laws of the State as construed by our Supreme Court, is Arbuckle Bros., of New York.

"'Very truly yours,

"'J. E. BLACKBURN,

"'Dairy and Food Commissioner.

"'COLUMBUS, OHIO, February 5, 1901.'

"Said circular letter or statement is wholly false in this, to wit, that complainants have not at any time refused, and still refuse, to accept said construction of—Ohio, as construed by the Supreme Court of said State, and that, as complainants are informed and believe, the Woolson Spice Company has not agreed to accept the said law as construed by respondent, but, on the contrary, has refused, and still refuses, to accept said construction of said law, and still continues to sell, in the State of Ohio, coffee prepared and glazed by processes for a long time used by them.

"Said circular, while purporting to be an answer to an inquiry, was, in fact, by said respondent sent generally to jobbers and dealers in food products within Ohio, few, if any, of whom had, in fact, inquired as therein stated; and, as complainants are informed and believe, was so circulated without such inquiry for the purpose of intimidating complainants and their customers, and with the effect of injuring complainants and their property.

* * * * * *

By said circular the respondent accused and threatened to accuse complainants and the dealers in Ohio, in complainants' products of a crime punishable by law, and to do an injury to the property of complainants and of the dealers aforesaid, with intent to compel complainants and the dealers aforesaid to do acts against their will, to wit: to cease from selling and offering for sale said Ariosa within Ohio (Record, pp. 7, 8 and 9).

"XIV. Any prosecutions, as threatened by said respondent, under his false and erroneous construction of the said statute, will be wholly without authority of law, and will deprive complainants of their property, to wit: the value of the Ariosa already manufactured, now in the possession of complainants and awaiting sale, and the value of such Ariosa in the hands of dealers and vendors thereof throughout the United States, and more particularly in Ohio, and complainants' trade and the good will of their business of vending said product within said State of Ohio, without due process of law.

"XV. * * * and still further and irreparable injury will accrue thereto" (the prop-

erty rights of complainants) "if respondent be permitted to institute or conduct proceedings or prosecutions against the vendors of, and dealers in, said Ariosa, as he has threatened and still threatens to do (Record, p. 9).

* * * * * *

"XVIII. Owing to the number of dealers in, and vendors of, Ariosa in Ohio, who will, under the respondent's wrongful and erroneous construction of said statute, be liable to prosecution, and will be so prosecuted, if the said respondent be permitted to carry out his aforesaid threats, and menaces, a multiplicity of suits will necessarily arise involving identical questions, relating to the existence, constitutionality, construction, scope and effect of said statute and to the complainants' rights of property in Ohio, and to the effect thereon of said statute; and thereby complainants' rights of property in Ohio will be determined in litigations to which complainants will not be, and cannot be, parties.

"The interests of such dealers are, in many cases, not in common with, nor representative of, the interests of complainants, and, therefore, there is great and imminent danger that in many of such suits and prosecutions no defense will be made by the defendants therein, either through lack of interest, or in wrongful collusion and conspiracy with the respondent, and that thereby the question of the construction of said statute will, in many of said suits and prosecutions, not be properly or skillfully presented and passed upon; all to the great and lasting prejudice and damage of complainants, who have not now, and will not thereafter, have any adequate remedy at law in the premises.

"Although such prosecutions shall uniformly result in the acquittal of the persons thereby charged, yet by reason of the multiplicity thereof and the avowed determination of the respondents to prosecute all persons selling or offering for sale, in Ohio, complainants' said product, the mere wrongful prosecutions will result in deterring many, if not all dealers in good products, in Ohio, from dealing in Ariosa, and thereby prevent complainants from selling their said product in said State, to complainants' great and irreparable injury" (Rec., pp. 10 & 11).

"XIX. The matter in dispute herein, exclusive of interest and costs, largely exceeds the sum of or value of Two Thousand Dollars in this, to wit: That by the said statements, menaces and threats of the respondent, and the prosecutions threatened to be instituted by him, complainants' trade in Ohio and elsewhere, the good will thereof, and the market value of the existing stocks of Ariosa now in the possession of complainants, have been, and will be, damaged, depreciated, and diminished in value to the extent of more than one hundred thousand dollars (Rec., p. 11).

"XX. The wrongful acts which said respondent threatens to do and, unless restrained, will do, * * * will make unmarketable in Ohio, and to a very large extent impair and destroy the market value of the large stocks of Ariosa which complainants now have on hand in Ohio, and will to a large extent deprive them of their said business and the good will thereof in Ohio, and greatly injure, if not wholly destroy, the value of the same, and enable complainants' competitors selling in Ohio coffees treated by processes similar to, but not identical with, complainants' said process, to obtain complainants' said business, which can only be regained after long time and at great expense; and complainants will be put to other great expense in defending their said property rights in Ohio" (Rec., pp. 15-16).

And that this damage, even during the limited time necessary to determine this cause, will be more than one hundred thousand dollars --

"an amount largely in excess of respondent's "ability to respond in judgment" (Rec., p. 16).

The case is thus brought within the line of precedents of which the following are late examples:

Farquahar v. Nat. Harrow Co., 102 Fed. Rep., 714 (1900):

Dallas, Circuit Judge (715), "Where notices are given or circulars distributed in good faith to warn against infringement, no wrong

whatever is committed; but where, as is here averred, they are not made or issued with such intent, but in bad faith, and solely for the purpose of destroying the business of another, a very different case is presented. In such a case property rights are fraudulently assailed, and a Court of Chancery, whose interposition is invoked for their protection, should not refuse to accord it. Emack *v.* Kane (C. C.), 34 Fed., 46; Kelley *v.* Manufacturing Co. (C. C.), 44 Fed., 23; 10 L. R. A., 686; Casey *v.* Union (C. C.), 45 Fed., 135; 12 L. R. A., 193; Toledo A. A. & N. M. Ry. Co. *v.* Pennsylvania Co. (C. C.), 54 Fed., 730; 19 L. R. A., 387; Computing Scale Co. *v.* National Computing Scale Co. (C. C.), 79 Fed., 962: Lewin *v.* Light Co. (C. C.), 81 Fed., 904; Railway Co. *v.* McConnell (C. C.), 82 Fed., 65; Adriance, Platt & Co. *v.* National Harrow Co. (C. C.), 98 Fed., 118; *In re* Debs. 158 U. S., 564; 15 Sup. Ct., 900; 39 L. Ed., 1092. * * *

The decree is reversed, and the cause will be remanded to the Circuit Court, with direction to enter a decree disallowing the demurrer to the bill of complaint, and with leave to the defendant to answer within such time as that Court may prescribe."

Adriance, Platt & Co. v. *Nat. Harrow Co.*, 121 Fed. Rep., 827 (1903):

(828): "WALLACE, Circuit Judge. This is an action in equity to restrain the defendant from the publication of circulars and letters asserting the violation by the complainant of the defendant's rights under letters patent, and threatening the complainant's customers with suits. The Court below dismissed the bill.

The facts bring it within the principle of the decision of the Circuit Court of Appeals for the Third Circuit, in a suit brought in the District of New Jersey against the present defendant. The doctrine there declared is well settled by the authorities, and the opinion in that case contains a sufficient citation of them without further reference. A. B. Farquahar Co. *v.* The National Harrow Company, 102 Fed., 714; 42 C. C. A., 600; 49 L. R. A., 755."

(At p. 830): "Until the present action was brought, the defendant contented itself with

warnings and threats to the complainant's customers, and made no attempt to prosecute an infringement suit. The publicity of the complainant's suit neutralized these threats, and the defendant brought several actions against customers of the complainant. Out of its numerous patents it selected one, presumably the least infirm, as the basis of its attack upon the complainant's alleged infringing harrow. Those suits, after the proofs were taken, came to an end by the voluntary dismissal of the bill. The inglorious conclusion of these suits may afford an explanation of the defendant's reasons for preferring to attack the complainant by the circulars and letters rather than in a court of justice.

We conclude that complainant was entitled to an injunction and an accounting. The decree is accordingly reversed, with costs, and with instructions to the Court below to decree accordingly."

Except that it was not nearly so urgent, the case last cited is peculiarly on all fours with ours. There, as here, threats of prosecution were aggravated by defamatory circulars. There as here, after suit for injunction was brought, the defendant in such suit actually instituted a prosecution such as he had threatened. And here, as there, the prosecution instituted by the defendant has been thrown out of the Ohio State Courts, and Ariosa declared to be a healthful mixture or compound which it is not unlawful to manufacture or sell in Ohio (see *White* vs. *Ohio*, and quotations from opinion of Court therein, fully noted below).

(2.) *The multiplicity of suits otherwise probable, is in itself sufficient ground for injunction.*

This point is too clear to need extended citation of authorities, among the leading of which, under similar conditions, are:

Donald v. *Scott*, 67 Fed. Rep., 854: In that case the complainant had imported into South Carolina

certain packages, each being "one barrel of Rochester beer, made in the State of New York"; and averred that upon the arrival of each of such packages at Charleston (S. C.), its destination, it was

> (855.) "forcibly seized by the defendants, claiming to act as state constables" (of S. Carolina), "and taken and carried away by them under the pretense of authority of the act of the general assembly of South Carolina, approved January 2, 1895, commonly known as the 'Dispensary Law.' * * *
>
> "That upon each seizure, and after demand and refusal, he brought his action for the unlawful trespass on his rights by the defendants; and that, notwithstanding this, they persist therein, and manifestly propose to drive him to a multiplicity of suits. That he has no adequate remedy at law for these repeated violations of his rights, as the defendants are notoriously insolvent and pecuniarily irresponsible. He avers that so much of the dispensary law as is set up in justification of these acts of the defendants in preventing him from importing for his own use and consumption alcoholic liquors, the products of other states, into this state, violates the interstate commerce law as established by the constitution and laws of the United States, and is null and void."

Whereupon the injunction asked by him and granted by the Circuit Court was sustained by this Court in *Scott* v. *Donold*, 165 U. S., 58.

One of the latest cases in this point is

City of Hutchinson et al. v. *Beckham et al.*, 118 Fed. Rep., 399 (1902):

> (401) (Court, by Thayer, Circuit Judge,) * * * "the complaint which was filed in the lower Court may be appropriately termed a 'bill of peace' (Story, Eq. Jur., Secs. 852, 853). * * * One paragraph of the bill, as heretofore shown, alleged that the city authorities, for the purpose of enforcing compliance with the ordinance, had already caused the arrest of their agents, and were threatening to

make further like arrests, and to institute numerous criminal prosecutions, and thereby prevent them from receiving, storing, and making speedy deliveries of goods, as had been their habit. Now, conceding that the validity of the ordinance might have been tried in any one of the criminal prosecutions thus brought by the City, yet, as the right of appeal existed from any judgment which might have been rendered therein, it is apparent that months, and possibly some years, might have elapsed before the invalidity of the ordinance would have been definitely established, and that in the meantime the complainants might, and probably would, have been compelled to defend a multitude of suits and submit to daily interruptions of their business, which would have proven to be very annoying, and probably disastrous. In such a case, the rule that a suit in equity will not lie to restrain the collection of an illegal tax, merely on the ground of its illegality, does not apply, because circumstances are alleged which show that if left to their remedy at law the complainants would probably be subjected to numerous prosecutions, besides sustaining great and irreparable loss in the prosecution of their business" (authorities cited).

How much more urgent is the case here than those elsewhere adjudged, such as to warrant relief by injunction, is suggested by Paragraph X. of the bill (Record, p. 6):

"X.—Complainants now and at all times have on hand at various points throughout the United States large stocks of the compound or mixture known as Ariosa. Said stocks now in Ohio amount to one million pounds, more or less, of the value of one hundred thousand dollars, and in the United States to ten million pounds, more or less, of the value of one million dollars. Complainants have a large number of agents in Ohio and elsewhere, engaged in the sale of said Ariosa, and in addition thereto, as complainants are informed and believe, a great number of dealers, to wit, *more than ten thousand in Ohio*, have in their possession large quantities of

> Ariosa for sale, have heretofore sold and still are, and will continue, selling the same to consumers * * *."

(3.) *The construction of a statute is not a matter of discretion. Defendant-respondent is left equally unprotected, whether by a void statute (if his construction is correct), or by the fact (if his construction is wrong) that the law is not such as he assumes it to be.*

Appellee's brief on the argument in the Circuit Court of Appeals below quoted, betrayed what, we submit, is his radically mistaken theory of law.

> "But counsel may search in vain for either a precedent or a good reason for a Court interfering in cases where the executive is merely exercising his judgment as to the guilt or innocence of a citizen, *or as to the manner of interpreting a statute.*
>
> "In brief, the Court will never substitute its judicial control for mere executive discretion."

That is to say, appellee's assumption, upon which he practically rests his whole case, is that the interpretation of a statute is a mere matter of executive discretion.

We respectfully submit as too plain to need argument that appellee is totally in error; and that in this as in every other case where the construction of a statute is in question, there is in a legal sense no possibility for either executive or judicial *discretion;* but that the Court, using not its discretion but its judgment, must assume, as absolute for the case before it, that reading of the Act which it finds correct, and hold the acts of executive officers to be legal or illegal, according as they comply with it or not.

The *crux* of this case is here compressed into a nutshell. Appellee, an executive officer, considers himself vested with *discretion* to carry out the law

as he may think it should be construed; to enforce it according to his own judgment rather than the judgment of a court; and to enforce as law that which is in fact not law.

Appellants' contention, on the other hand, is that an act done by an executive officer under misapprehension of the law, is void, no matter how sincere his misunderstanding; and, therefore, that in regard to acts not authorized by such construction of the law as *the Court* finds to be the true one, his official station is no protection against any restraint to which a private person, acting under a similar mistake as to his own rights, would be subjected by the courts. There is no "discretion" to violate law, even in an "executive."

In short, the real question here (as always) is not so much the constitutionality of the law, abstractly considered, but whether, to the extent that it is valid, it justifies the acts complained of. As the Court said in *R. R. Co.* v. [illegible]*y*, 35 Fed. Rep., 866, quoted verbatim with approval in *Union Pac. R. Co.* v. *Alexander*, 113 Fed., 347, above quoted:

> (871.) "The bill rests solely upon the proposition that the property rights of the complainants are involved by the threatened action of the defendants, and this is a judicial inquiry to see whether they have authority for their action—whether the law on which they rely is valid and constitutional, *or suffictent to justify the action which they are taking.*"

(4.) *Defendant is utterly mistaken in the construction he claims for the Ohio statute, under color of which his threats are made—Ariosa being within the saving clause, and not within the prohibition of such statute.*

The bill here having been dismissed before answer, and its allegations, therefore, assumed to be admitted as on demurrer, its allegations of fact would

be sufficient upon this point, for they include the following:

"III.—For more than thirty years last past complainant, John Arbuckle, and his successive copartners, and for many years last past, these complainants have been and still are, engaged in the manufactnre and sale throughout the United States, including the State of Ohio, of a certain compound or mixture known as 'Ariosa,' composed of roasted coffee compounded and mixed with eggs and sugar, originated, invented, patented, manufactured, and sold solely by said complainants and their predecessors, and by them denominated 'Ariosa.' Ariosa consists of roasted coffee compounded and mixed with eggs and sugar, packed in sealed packages, ready for use by the consumer. * * * (Rec., p. 3.)

"V.—* * * for many years prior to 1894, complainants' predecessors caused to be printed upon each package of Ariosa, in conspicuous type, a certain label, statement and affidavit setting forth the use of said process and the purpose and effect thereof. And in or about 1894, complainants caused, ever since have caused, and still cause to be printed, in conspicuous type upon every package of Ariosa, a certain label, statement and formula being a true statement of the process and formula by and according to which said compound is manufactured and the purpose and effect thereof, in the words and figures following, to wit": (Here follow verbatim the statement and formula). * * *

(Complainants') "said process was not adopted and is not used for the purpose, nor with the effect, of lowering or depreciating or injuriously affecting the quality, strength, or purity of the coffee; nor of substituting any inferior or cheaper substance or substances, wholly or in part for it; nor of abstracting from it any valuable or necessary constituent or ingredient, either wholly or in part; nor of concealing damages or inferiority in the coffee, or making it appear better or of greater value than it really is; nor in any way whatsoever violating the provisions of the said statute of Ohio above set forth. On the contrary, the coffee used in

said compound or mixture is of good quality and undamaged; said articles of food used in the process above described for coating said coffee are, in themselves, pure, wholesome, healthful and innocuous; said preparation of egg and sugar, used in the said process for coating said coffee is colorless and transparent, and does not in any way conceal the true nature, grade, or original appearance of said coffee; and said process was adopted and used, and still is used, at great expense, for the benefit of the consumer only, the cost and value of the said ingredients used therein greatly exceeding in proportion to weight and bulk, the worth and value of roasted coffee." (Rec., pp. 5-6.)

"IX.—Ariosa is exclusively exposed for sale in sealed paper packages and the purchaser thereof is advised of its quality and composition; (1) by the general repute of the said compound; (2) by his former personal experiences in the use of the same, and (3) by the statement or affidavit setting forth its quality and composition printed on said packages as aforesaid; and is not and cannot be misled by the appearance of the coffee, at the time of the sale, which appearance is not disclosed until after purchase." * * *

"Said process is not used to affect or change the appearance of said coffe; any change in the appearance thereof due to said glazing being an incidental and immaterial consequence of the use thereof, not such as to assimilate said coffee in appearance to other or better grades, but such as to accentuate and render more clearly distinguishable any defects or imperfections which may exist in the same." (Rec., pp. 6 and 7.)

But, in addition, we have the authority, conclusive here, of the Ohio courts, which, on this point, have ruled directly against the construction claimed by the appellee and in favor of that claimed by the appellants here, and this in a late case where the precise point was litigated between appellee here and an Ohio dealer, whom, after this suit was brought, he actually did prosecute as by the bill herein it is alleged he had threatened to do.

James A. White was, April 1, 1901, arrested upon a warrant issued by Charles W. Meck, a Justice of the Peace of Toledo, charged with unlawfully selling to Edward B. Beverstock, an inspector in the employ of the Dairy and Food Commissioner of Ohio, "one pound of roasted coffee labeled 'Ariosa.'"

Trial was had. The defendant was convicted and sentenced to pay a fine of $50. He prosecuted error to the Common Pleas Court. The error case was heard before Pugsley, *J.*, who, November 14, 1901, rendered a decision reversing the judgment of conviction (see *White* vs. *Ohio*, *12 O*, *Nisi Prius Dec.*, 659). The opinion, upon this point, being as follows:

> "Upon the trial of the case it was contended by the defendant that upon the undisputed facts, the coffee sold by him as charged in the affidavit was within the proviso of the statute, which *exempts* from its provisions mixtures or compounds recognized as ordinary articles or ingredients of articles of food, when each and every package sold or offered for sale is distinctly labeled as a mixture or compound, with the name and per cent. of each ingredient therein, if they are not injurious to health; and that therefore he was not guilty of a violation of the law, and the jury should have been so instructed.
>
> "The undisputed facts as shown by the testimony are, that Ariosa coffee, a pound package of which was sold by White, was and had been for many years manufactured by Arbuckle Bros., and consisted of roasted coffee, coated or glazed with a mixture of sugar and eggs, constituting a transparent and exceedingly thin film; that the coffee so prepared was put up in packages holding a pound each, and tightly sealed, and that upon the wrapper inclosing each package was placed a label upon which were printed in clear large type the following words: 'Ariosa is a compound made from coffee, sugar and eggs. Choice eggs and pure granulated sugar are the only articles used in hermetically sealing Arbuckle's Ariosa coffee. Formula: Coffee,

.99978; eggs, .00361; sugar, .00361.' That the per cent. of each ingredient as stated in the label is correct; and that the coffee so prepared and put up for sale is not injurious to health. These facts being shown, the only question in dispute is, whether Ariosa coffee so prepared is a mixture or compound within the meaning of the law.

"In the first place, the statute itself to some extent furnishes a guide to the correct meaning of these words, for it says in Sec. 4200–5, 'The term food as used herein shall include all articles used for food or drink by man, whether simple, mixed or compound.' For the purposes of the statute, all articles of food are designated as either simple or mixed or compound. If an article of food may fairly and properly be called simple, then it is not mixed or compound; but if it cannot be fairly designated as simple, then it is mixed or compound, whatever may be the usual or recognized definition of those words when applied to other articles or objects than food. An apparent difficulty arises in attempting to define these words, from the fact that they are rarely used in connection with food; but when we consider the etymological sense of the words, the manner in which and the purpose for which they are used in the statute, and especially the manifest intent of the statute, I think there is no doubt as to their meaning.

"The Century Dictionary defines these words as follows: 'Simple: derived from the Latin *simplex;* onefold, as opposed to duplex, twofold; without parts; elementary; uncompounded.' Among numerous examples given of the use of the word in connection with various objects and conditions, the only one which bears any resemblance to the word as applied to food, is 'Simple medicine' which is defined as a medicine consisting of a single drug. 'Mixed' is defined as consisting of different elements or parts, mingled. Sample: mixed fish—fish of various kinds, including soft fish and hard fish. I will add examples not given in the dictionary, 'mixed pickles,' 'mince meat,' which is also sometimes put up in packages and sold, and which is composed of a variety of simple articles

of food. 'Mixture' is defined as 'that which results from mixing; a compound; the combination of different parts or ingredients. Mixture is a general term denoting a compound of two or more ingredients, more often, but not necessarily congruous.' 'Compound,' the adjective, is defined as 'composed of two or more elements, parts, or ingredients; not simple.' 'Compound, the noun, is defined as 'something produced by combining two or more ingredients, parts, or elements.' All articles of food being described in the statute as either simple, mixed or compound, and the words being given their ordinary signification, a simple article of food is a single article of food, one not consisting of parts or ingredients which are themselves articles of food. Food is compound or mixed, which is not simple. It is food consisting of two or more ingredients combined, united or mixed in any manner or to any extent. There is nothing in the law or the reason of the law which prescribes how the ingredients shall be combined or mixed, nor what shall be the relative proportions or situation of the ingredients in the combination or mixture. Ariosa coffee is composed of three ingredients—eggs, sugar, and coffee, each of which is a simple and recognized article of food. The combination is not simple food. Under the law it must be a compound or mixture, and for the purposes of the statute, it matters not which.

"The plain intent of the law is to protect the public health by forbidding the manufacture and sale of impure food, and to protect the public against being deceived by the purchase of an article of food which appears to be, or is represented to be, or by its name is supposed to be, something different, or purer or better than it really is. An examination of the seven different methods by which food may be adulterated within the meaning of the law, clearly shows that the articles of food, the manufacture and sale of which are prohibited, are only such as are injurious to health, or composed of unwholesome ingredients, or prepared in such a manner as is calculated to deceive and lead the buyer to purchase an article which is inferior in quality or purity to what

from its appearance or name he has reason to suppose it to be. Hence, in view of the object to be accomplished—to protect the public health and prevent deception—it was provided that an article of food composed of two or more ingredients which are recognized as ordinary articles of food, and no one of which is deleterious to health, whether singly or in combination, shall not be regarded as an adulteration, if it is put in a package and such package is distinctly labeled as a compound or mixture, with the name and per cent. of each ingredient. By the sale of such an article so prepared and put out for sale, the public health is not injured, and no one is deceived. It is not even calculated to deceive. Within the plain intent of the law it is unadulterated food, no matter in what manner or to what extent the ingredients are combined or mixed. In securing the object desired in enacting the law, no reason exists for exempting one method of combining the ingredients which does not apply to every other method, and it will not be presumed that any distinction in that regard was intended.

"It is contended by the prosecution that to form a compound or mixture, the ingredients must be so united or mixed as to form a new or distinct substance. If this means simply that the substance formed by the union or mixture must be something different from any of the ingredients, then Ariosa coffee is such new and distinct substance; but if it means that the identity of all the ingredients must be lost, or that they must be so united that none of them can be seen or detected in the substance formed, there is no reason or authority for the definition. Examples have already been given of articles of food which are clearly mixtures, although the identity of the ingredients is not lost. But a conclusive answer, it seems to me, is, that if an article of food is composed of two or more ingredients which are articles of food, it is not a simple food. It must, under the law, therefore, be what is there termed a compound or mixture; and whether or not the combination forms a new or distinct substance is immaterial.

"*I am clearly of the opinion that Ariosa coffee is within the proviso (saving clause) of the*

statute, and that it is not unlawful to manufacture or sell it. I find, therefore, that the Court erred in not instructing the jury to return a verdict of not guilty on the undisputed facts, and that the verdict rendered by the jury is contrary to the law and the evidence."

Whereupon White was absolutely discharged and Judge Pugsley's decision above quoted **accepted as a finality by the Dairy and Food Commissioner, the respondent here**—though the statutes of Ohio permits such a case to be taken to the Supreme Court for review, and a bill of exceptions under such statutes was allowed by the trial court for that purpose.

(5.) *To justify acts thereunder as within the police powers of the State, the construction of the statute permitting or requiring such acts must be—*

(*a*) *The proper and legal construction of such statute; and*

(*b*) *Such as subserves some public end justifying the exercise of such police powers.*

As to (*a*), argument will be superfluous. A statute has no existence except as properly and legally construed. Any other construction being at best but the mistake of the individual making it, and utterly void as a defense for his act thereunder.

As to (*b*), precedent is too well settled to justify more than brief reference to a few of the latest authorities:

In Matter of Jacobs, 98 N. Y., 98 (1885), the Court said (110): "Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of "its discretion is not subject to review by the courts. But they must

have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the Courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the Legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does conclude the Courts, and they must yet determine the fact declared and enforce the supreme law." * * *

After thorough and clear discussion of the point in question, the Court concludes with the statement of principle that has made it a leading case—

(115) "When a health law is challenged in the Courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the Courts must be able to see that it has at least, in fact, some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void. In reaching this conclusion we have not been unmindful that the power which Courts possess to condemn legislative acts which are in conflict with the supreme law should be exercised with great caution and even with reluctance. But as said by Chancellor Kent (1 Com., 450): 'It is only by the free exercise of this power that courts of justice are enabled to repel assaults and to protect every part of the government and every member of the community from undue and destructive innovations upon their charter rights.' * * *

In *Minnesota* vs. *Barber*, 136 U. S., 313 (1889), a writ of *habeas corpus* was prayed to release the pe-

titioner, who had been convicted of a violation of the statute of Minnesota respecting the inspection of fresh meats. The State of Indiana having passed a similar statute, counsel intervened on behalf of that State and took part in the argument of this case. The statute was held unconstitutional, the Court saying:

> (328) "It is one thing for a State to exclude from its limits cattle, sheep or swine actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they were taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a State to declare, as does Minnesota, by the necessary operation of its statute, that fresh beef, veal, mutton, lamb or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State."

In re Marshall, 102 Fed. Rep. 323 (May 16, 1900):

An ordinance of Marin County, California, forbade any person in the County of Marin to use any repeating shotgun for the purpose of killing quail, &c.

Marshall was convicted in the State court of having killed a quail with a repeating shotgun.

Question was as to the constitutionality under Fourteenth Amendment, United States Constitution, providing that no State shall "deprive any person of life, liberty or property, without due process of law."

> Court (325): "* * * In the present instance, *what was the end sought? Manifestly, only the prevention of the taking or killing by any one person of more than 25 quail, partridge, or grouse in any one day.* * * *
>
> "* * * *That end is just as effectively accomplished without the obnoxious section as with it.* It is wholly immaterial to that object whether

> the sportsman or hunter uses a repeating or magazine gun, or a double or single barreled gun * * * and the opportunity of detection is just as great in one case as in the other. *No valid reason is therefore perceived, and none has been suggested by counsel why the owner of a repeating or magazine shotgun should be prohibited from using it.* * * *

See *Black on Interpretation of Statutes*, 304:

> "Statutes enacted by the Legislature in the exercise of the police power, for the promotion or preservation of the public safety, health or morals, may sometimes infringe upon the liberty of individuals by restricting their use of their property or abridging their freedom in the conduct of their business. When this is the case, such statute ought always to receive such a construction as will carry out the purpose and intent of the Legislature with the least possible interference with the rights and liberties of private citizens. * * * *And similar principles will be found applicable to laws* * * * *which concern the purity of food products* * * * *and to many other classes of enactments designed to further the general welfare by derogating from the liberty of a few.*"

Finally, in *White* vs. *Ohio*, 12 Ohio Decisions (N. P.), 659 (1901), we have an adjudication of the Ohio courts on the identical law and facts to which this point applies here.

April 1, 1901 (after our suit here pending was brought) James A. White, of Toledo, Ohio, was arrested on complaint of Beverstock, an employe of respondent, charging him, White, with a misdemeanor in that he had sold said Beverstock one pound of Ariosa coffee in violation of the very Statute, validity and construction of which is at issue here. Of the Opinion (more fully quoted *supra*) the following—a finding of fact as well as of law—at once illustrates and justifies our contention:

> PUGSLEY, *J.* "The plain intent of the law is to protect the public health by forbidding the

manufacture and sale of impure food, and to protect the public against being deceived by the purchase of an article of food which appears to be, or is represented to be, or by its name is supposed to be, something different, or purer or better than it really is. An examination of the seven different methods by which food may be adulterated within the meaning of the law, clearly shows that the articles of food, the manufacture and sale of which are prohibited, are only such as are injurious to health, or composed of unwholesome ingredients, or prepared in such a manner as is calculated to deceive and lead the buyer to purchase an article which is inferior in quality or purity to what from its appearance or name he has reason to suppose it to be. Hence, in view of the object to be accomplished—to protect the public health and prevent deception—it was provided that an article of food composed of two or more ingredients which are recognized as ordinary articles of food, and no one of which is deleterious to health, whether singly or in combination, shall not be regarded as an adulteration, if it is put in a package and such package is distinctly labeled as a compound or mixture, with the name and per cent. of each ingredient. By the sale of such an article so prepared and put out for sale, the public health is not injured, and no one is deceived. It is not even calculated to deceive. Within the plain intent of the law it is unadulterated food, no matter in what manner or to what extent the ingredients are combined or mixed. In securing the object desired in enacting the law, no reason exists for exempting one method of combining the ingredients which does not apply to every other method, and it will not be presumed that any distinction in that regard was intended." * * *

We therefore have as conclusions that need no argument.

(c.) *Properly construed, the Ohio Statute in question is no protection to respondent; and*

(d.) *Respondent's erroneous construction is as utterly futile as a defense here, as can be possibly be the statute itself were its effect such as he claims.*

Such is the latest construction of the Ohio law by the Courts of that State. The only other one, the old case of *Pre Digested Food Co.* vs. *Neal, Dairy Commissioner*, 4 Ohio Dec. (S. & C. P.), 456, being so clearly distinguished, not to say out of point, from our case that there would be no occasion to mention it, except that respondent here has so strenuously urged it.

In that case, plaintiff, on behalf of a medicine known as "Paskola," asked that the defendant, then Dairy and Food Commissioner of Ohio, be restrained—

(1) from prosecuting any one for selling "Paskola";

(2) from prosecuting more cases than defendant, in such cases, was able to defend;

(3) from publishing false statements as to the ingredients of "Paskola";

(4) from threatening plaintiff's customers that if they sell "Paskola" they will be arrested and prosecuted.

As will be seen from the decision: *In the Neal case no question whatever was made as to either the constitutionality or the construction of the Ohio law, under which the Commissioner was then proceeding*, and, whatever points might have been raised had proper allegations been made and such points been pressed, *the only ruling actually made was that a State Court would not restrain officials of its State from proceeding under a atute, the validity and construction of which were unquestioned, simply because their acts under such statute would affect property rights and depreciate a business.*

(6.) *In this case, beyond all others cited, complainants have no adequate remedy at law.*

In many cases injunctions have been granted to relieve a plaintiff from harassment by multiplicity of suits against *himself*. Though in such cases the

Court has sometimes held that in the particular instance his opportunity to defend was such that equity should not intervene.

In the case of criminal prosecutions, too, it has been sometimes suggested that, however, unpleasant such prosecutions may be, they are not merely against the person (which equity has no jurisdiction to protect) but at most *malum absque injuria*—since it must be assumed that the innocent will be acquitted.

In most cases where the complainants were nonresidents of the jurisdiction where prosecutions were threatened, the courts have enjoined threatened multiplicity of suits against their agents, servants, &c., within such jurisdiction.

In our case, however—

(*a.*) The suits threatened are not against complainants; hence are not such as they can defend, if brought;

(*b.*) Nor are they against complainants' agents, or servants—who might, perhaps, be assumed likely, if sued, to permit complainants to defend them;

(*c.*) Nor are they against the personal liberty or political rights of complainants.

On the contrary, such threatened prosecutions are (1) against others than complainants—hence such as they cannot, of course, defend; (2) against those not in privity with complainants—hence under no obligation to permit complainants to aid in their defense; (3) not here complained of as attacks on the liberty of complainants or of any one else; but as interference with the *business*—that is with the *property rights*—of complainants—the precise class of wrongs against which the remedy of injunction was framed.

Remembering, as shown by the bill, that most of the more than ten thousand retail grocers in Ohio (prosecution of whom defendant threatens) would find it much more profitable to sell the coffee of

other manufacturers than to stand arrest and prosecution for selling Ariosa (no matter how convinced each might be that it was a healthful and honest preparation of coffee)—this being the precise intent of Blackburn's wrongful attack by threats and circulars—the allegations of the bill on this point are their own best explanation.

> "X. Complainants now and at all times have on hand at various points throughout the United States large stocks of the compound or mixture known as Ariosa. Said stocks now in Ohio amount to one million pounds, more or less, of the value of one hundred thousand dollars, and in the United States to ten million pounds, more or less, of the value of one million dollars. Complainants have a large number of agents in Ohio and elsewhere, engaged in the sale of said Ariosa, and in addition thereto, as complainants are informed and believe, a great number of dealers, to wit, more than ten thousand in Ohio, have in their possession large quantities of Ariosa for sale, having heretofore sold and still are, and will continue, selling the same to consumers, in preference to other brands of coffee * * * " (unless deterred as threatened) (Rec., p. 6).
>
> "XII. Respondent has menaced and threatened with prosecution, and still menaces and threatens to prosecute dealers in, and vendors of, said Ariosa within Ohio, for a violation of the aforesaid statute, and as complainants verily believe, will, unless restrained therefrom by the order of this Honorable Court, institute a large number of prosecutions against such dealers in and vendors of said Ariosa, upon the wrongful and erroneous charge that the treatment of said Ariosa by the process above described is a violation of the statute aforesaid, and that said Ariosa is an adulterated food product within the said statute and the prohibition thereof. By reason of the aforesaid official capacity of the said respondent, and the fact that he claims to act under the said statute intended to prevent the adulteration of food products, said respondent's statements and threats of prosecution have led, do lead, and will hereafter continue to lead, the

dealers in, and consumers of, said Ariosa throughout the United States and more particularly in Ohio, to doubt the healthful character and proper preparation of the said food product and the integrity of the complainants, as manufacturers thereof, and have deterred, do deter and will hereafter deter, both wholesale and retail dealers and consumers in Ohio and elsewhere from purchasing, vending or using Ariosa. * * *" (Rec., p. 7).

"XIII. * * * Said circular, while purporting to be an answer to an inquiry, was, in fact, by said respondent sent generally to jobbers and dealers in food products within Ohio, few, if any, of whom had, in fact, inquired as therein stated, and, as complainants are informed and believe, was so circulated without such inquiry, for the purpose of intimidating complainants and their customers, and with the effect of injuring complainants and their property.

* * * * *

"By said circular the respondent accused and threatened to accuse complainants and the dealers in Ohio in complainants' products of a crime punishable by law, and to do an injury to the property of complainants and of the dealers aforesaid, with intent to compel complainants and the dealers aforesaid to do acts against their will, to wit, to cease from selling and offering for sale said Ariosa within Ohio" (Rec., p. 9).

* * * * *

"XVII. Owing to the number of dealers in and vendors of Ariosa in Ohio who will, under the respondent's wrongful and erroneous construction of said statute, be liable to prosecution, and will be so prosecuted, if the said respondent be permitted to carry out his aforesaid threats and menaces, a multiplicity of suits will necessarily arise involving identical questions relating to the existence, constitutionality, construction, scope and effect of said statute and to the complainants' rights of property in Ohio, and to the effect thereon of said statute; and thereby complainants' rights of property in Ohio will be determined in litigations to which complainants will not be, and cannot be, parties.

"The interest of such dealers are, in many cases, not in common with, nor representative of, the interests of the complainants, and, therefore, there is great and imminent danger that in many of such suits and prosecutions no defense will be made by the defendants therein, either through lack of interest or in wrongful collusion and conspiracy with the respondent, and that thereby the question of the construction of said statute will in many of said suits and prosecutions not be properly or skillfully presented and passed upon; all to the great and lasting prejudice and damage of complainants, who have not now, and will not thereafter, have any adequate remedy at law in the premises.

"Although such prosecutions shall uniformly result in the acquittal of the persons thereby charged, yet by reason of the multiplicity thereof and the avowed determination of the respondents to prosecute all persons selling or offering for sale, in Ohio, complainants' said product, the mere wrongful prosecutions will result in deterring many, if not all, dealers in good products, in Ohio, from dealing in Ariosa, and thereby prevent complainants from selling their said product in said State, to complainants' great and irreparable injury."

It must constantly be kept in mind that *the injunction here asked is even more against the threats than the prosecution*. To some extent actual prosecution may be met. But against *threats of prosecution*—here the most damaging portion of defendant's attack—injunction is the only defense possible against irremediable damage from this prostitution of respondents personal influence, largely resulting from his office.

Complainants are residents of a distant State; respondent has threatened to prosecute, not complainant's agents, but each of the more than ten thousand retail dealers who now handle complainant's Ariosa in the State of Ohio. Not one of them has any privity with complainants or any interest either to protect them or to continue selling their

product at the risk of criminal prosecution. Complainants are powerless either to make or compel defense, and still more so to procure the Ohio retail dealers to submit to arrest, fine and imprisonment, that writs of *habeas corpus* may be taken out for complainants' benefit. There is, therefore, no adequate remedy at law for the threatened and inevitable injury to complainants' property rights.

The alternative certain to occur is precisely that which the threats of the respondent are aptly designed to produce, and which, as the affidavits herein submitted show, such threats actually have produced—the refusal by the grocers of Ohio to keep the complainants' product on sale, the destruction of the immensely valuable good-will of complainants' business in Ohio, and consequent great and irreparable injury to the complainants, for which the respondent is unable to respond in damages, even if they could be calculated.

It will not do to answer that complainants should come into Ohio and there engage in marketing Ariosa expressly in order to be prosecuted. One of the purposes for which the Federal Courts are constituted is to afford remedies at law and equity in each State to those residing elsewhere whose rights require such protection. Respondent is attacking our property, the good-will of our business. He is destroying it by his threats to prosecute, not us or our agents, but the ten thousand grocers of Ohio who are not bound to defend our interests, and with whom we are not in privity.

This feature distinguishes our case from all others where injunctions have been refused, and brings it peculiarly within those where the Court will seek a way to protect the property rights thus threatened.

> "No maxim is more firmly rooted in English and American jurisprudence than the one which, given a free translation, declares that 'No wrong shall exist without a remedy.'"[1]

[1] Spelling on Extraordinary Relief (Preface).

(7.) *The statute in question, if construed as respondent claims—and in any case his such construction—is unconstitutional and of no protection to him.*

(*a*) Because an attemped interference by a State with interstate commerce, expressly relegates to Congress by Article 1, Section 8, Clause 3 of the Constitution of the United States.

(*b*) Because a denial to complainants by the State of Ohio of the equal protection of its laws in violation of the Fourteenth Amendment of the Constitution of the United States.

(*c*) Because a deprivation of complainants by the State of Ohio of their property without due process of law; also in violation of the Fourteenth Amendment of the Constitution of the United States.

This case being, as it were, argued on demurrer to the bill, it would be superfluous to more than so note the issues involved as to show that they are in fact raised by the allegations of the bill, and to settle such precedent as may suggest our position.

As to (*a*), (*b*) and (*c*), after setting forth facts abundantly justifying such conclusions, the bill alleges (Record, pp. 9 and 10):

" XVI. Said statute, construed as respondent claims it should be, is in conflict with the fourteenth amendment to the Constitution of the United States, and void, in that it would deprive complainants of their aforesaid property by prohibiting them from selling in Ohio, and dealers in, and vendors of, food products from purchasing from the complainants pure food products, which are ordinary articles of food and are not injurious to health, to wit, coffee, sugar and eggs and a mixture of compounds recognized as an ordinary article and ingredient of food and not injurious to health and all the ingredients of which are recognized as ordinary articles of food and are not injurious to health, and from dealing in the same, in Ohio, and by destroying the value of said product as an article

of commerce by prohibiting the purchase and sale thereof, and thus would deprive complainants not only of the just and lawful benefits accruing to them by reason of their property rights acquired in said food products as aforesaid, but, further, would largely destroy the market value of the existing stock of Ariosa in the possession of complainants in Ohio and elsewhere and would deny to these complainants and to the dealers in, and vendors of, said Ariosa, within the jurisdiction of the State of Ohio, equal portection of the law.

"XVII. Ariosa is manufactured and treated, according to the aforesaid process, at complainants' factories in New York and Pennsylvania, and not in Ohio. After being so manufactured and treated, it is at said factories packed in packages, and is, in said original packages, shipped by complainants into Ohio; and is sold in such original packages; and said statute, if construed as the respondent herein claims it should be, is a regulation by the said State of Ohio of interstate commerce, and is repugnant to, and in violation of the third clause of section eight of article one of the Constitution of the United States, and void."

See *Matter of Jacobs* (*supra*):

(105) "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."

In *Jew Ho* vs. *Williamson*, 103 Fed. Rep., 10 (1900), a similar case, the Court held:

(23.) "But there is still another feature of this case that has been called to the attention of the Court, and that is its discriminating charac-

ter; that is to say, it is said that this quarantine discriminates against the Chinese population of this city (citing Yick Wo *vs.* Hopkins, 118 U. S., 356). 'Though the law itself be fair on its face and impartial in appearance, *yet, if is applied and administered by public authority with an evil eye and an unequal hand*, so as practically to make unjust and illegal discriminations, between persons of similar circumstances, material to their rights, the denial of equal justice *is still within the prohibition of the Constitution*.'

(26.) "It follows from the remarks that I have made, that this quarantine cannot be continued, by reason of the fact that it is unreasonable, unjust and oppressive, and, therefore, contrary to the laws limiting the police powers of the State, and municipality in such matters; and, second, that it is discriminating in its character, and is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States."

Schollenberger vs. *Pennsylvania*, 171 U. S., 1 (1898):

The last mentioned decision being of the United States Supreme Court, and hence of absolute authority here, is peculiarly strong, in that it protects interstate commerce, not merely in food products, though so prepared as to violate provisions of State law which are assumed to be valid as to manufacture within such State, but specifically protects articles which are the subject of interstate commerce, from State prohibition, even though they are so far the subject of adulteration as to justify inspection, &c., laws. The Court says—

(15.) "The fact that it may be adulterated does not afford a foundation to absolutely prohibit its introduction into the State. Although the adulterated article may possibly in some cases be injurious to the health of the public, yet that does not furnish a justification for an absolute prohibition. A law which does thus prohibit the introduction of an article like oleomargarine within the State is not a law which regulates or

restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced. We do not think this is a fair exercise of legislative discretion when applied to the article in question."

The Court further distinguishes the case of simultation of a different article, that is, misrepresentation—

(17.) "Nor is the question determined adversely to this view in the case of *Plumley* vs. *Massachusetts*, 155 U. S., 462. The statute in that case prevented the sale of this substance in imitation of yellow butter produced from pure unadulterated milk or cream of same, and the statute contained a proviso that nothing therein should be construed to prohibit the manufacture or sale of oleomargarine in a separate or distinct form and in such manner as will advise the consumer of its real character, free from coloration or ingredients that cause it to look like butter.' This Court held that a conviction under that statute for having sold an article known as oleomargarine, not produced from unadulterated milk or cream, but manufactured *in imitation of yellow butter produced from pure unadulterated milk or cream was valid.*

(18.) "It will thus be seen that the case was based entirely upon the theory of the right of a State to prevent deception and fraud in the sale of any article, and that it was the fraud and deception contained in selling the article for what it was not, and in selling it so that it should appear to be another and a different article, that this right of the State was upheld. * * *."

And concludes:

(24.) * * * "*The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His*

right is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the State to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the State law does really inspect and does not substantially prohibit the introduction of the pure article and thereby interfere with interstate commerce. It cannot, for the purpose of preventing the introduction of an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome. The Act of the Legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another State and its sale in the original package, as described in the special verdict, is invalid."

(8.) *In a case where serious wrong cannot otherwise be righted, equity will neither hesitate to exercise its jurisdiction to the full extent of its scope, nor be nice to seek reasons why it should not do so.*

Southern Exp. Co. vs. *Mayor, &c., of Ensley*
116 Fed. Rep., 756 (1902):

JONES, District Judge:

(761.) "The courts of the United States should not be astute to find technical reasons for denying the affirmative enforcement of such a right on the theory that the wrong would be irreparable, if the money lawlessly exacted as a commutation for the right which the constitution gives without price can finally be recovered back from the wrongdoer. Compelling the citizen thus wronged to first pay the unlawful exaction, and then sue for damages or to recover the money, puts the constitution in abeyance for the time being, and forces the citizen temporarily to submit to the wrong as a condition precedent to enforcing the constitution. However proper such a view may be as regards ordinary trespasses to mere property rights, it

seems out of place in dealing with the forcible denial of a fundamental constitutional right."

Niagara Fire Insurance Co. vs. *Cornell*, 110 Fed. Rep., 816 (1901):

McPHERSON, District Judge:

(820.) "I suppose all the States have special proceed ings for the hearing of grievances, and such proceedings are sustained if along the line somewhere, and by some reasonable method, the party can have a hearing in the courts. And it is equally clear that such remedy is not to the exclusion of the power of a Federal court to act. There may be a plain speedy and adequate remedy at law in the State courts, but with the proper parties, with the requisite citizenship, and the necessary amount involved, a federal court sitting in chancery may take hold of the case and order the proper decree. And the more so is this true when federal questions are presented, as in this case. And these conclusions, but briefly stated, obviate the discussion of many questions argued by counsel. * * *

(826.) "I had supposed, and still believe, that an unconstitutional law was as though never passed."

Central Trust Co. vs. *Citizens' St. R. Co.*, 80 Fed. Rep., 218 (1897):

SHOWALTER, Circuit Judge:

(226.) "My opinion is that, where proceedings in effect destructive of a vested property right are threatened by a defendant in official position under color of a void statute, the preliminary injunction ought to issue.

The suggestion by the learned attorney general that, in any event, this Court ought not to consider the case made by this bill until the Supreme Court of Indiana has pronounced upon the specific enactment in contention, is one which I have no right to entertain It is ordered that the injunction issue as prayed."

Union Pac. R. Co. vs. *Alexander*, 113 Fed. Rep., 347 (1901):

(350.) "The bill rests solely upon the proposition that the property rights of the complainants

are involved by the threatened actions of the defendants, and this is a judicial inquiry to see whether they have authority for their actions—whether the law upon which they rely is valid and constitutional, or sufficient to justify the action which they are taking. It was insisted at the argument that the complainants had an adequate remedy at law, and therefore a court of equity had no jurisdiction. The rule, as I understand it, is that the jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances. Within this rule, I think, the bill states a case of equitable cognizance, and the conclusion reached is that the Court has jurisdiction.

"This brings us to the consideration of the second question, viz.: Does the act of the Legislature in controversy in this case conflict with the provisions of the constitution of the State? It was insisted at the argument that the Federal courts will not willingly pronounce, in advance of the State courts, an act unconstitutional. This is quite true, but it is conceded in one of the briefs handed to me by defendants' counsel that the Supreme Court has not passed upon the constitutionality of this act, and in the language of Chief Justice Marshall in the case of Cohen *v.* Virginia, 6 Wheat., 264, 5 L. Ed., 257, the judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it is brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given."

Smyth vs. *Ames*, 169 U. S., 466 (1898).

(p. 478.) "We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular State in which suit may be brought.

> One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that Court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action. * * * (Cases cited). But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of federal jurisdiction (Cases cited)."

CONCLUSION.

In short, eggs, sugar and coffee, each being an ordinary and healthful ingredient of food, any citizen of Ohio has a right to sell, purchase or use either, in any shape he sees fit. It is no business of the State how much he values each, the proportion in which he shall mix them, or the manner in which he shall prepare, drink, or otherwise use them. If he chooses to buy them, compounded or mixed, or, if the prosecution prefer, "aggregated," as Ariosa, he has a right to do so. The term "Ariosa" having become in common use to describe a food article, prepared as here shown, it is his right on purchasing "Ariosa" to receive it. He would be defrauded should there be delivered him upon his order for Ariosa a coffee preparation lacking the glazing here complained of. It would be as impertinent as it would be intolerable and illegal for the State to dictate to him what he shall want, or to the man from whom he purchases what he shall give, instead of the article ordered. Whether he wishes eggs and sugar with his coffee, or why he wishes it, is his business, not that of the State or of any follow-citizen.

The facts here are peculiarly clear. For above thirty years a certain preparation has been manu-

factured, marketed and used under a certain name. It is not claimed to be either a simulation of anything else, or to be other than an ordinary healthful food product. The particular glazing here in question is *the* characteristic demanded by the purchaser when he asks for Ariosa, instead of some other brand. He has a right to have it; the vendor has a right to sell it to him.

> " * * * The Courts have gone to great length in upholding legislation under the police power. In some decisions it has been so magnified as to be regarded as almost omnipotent. We do not agree to the doctrine that under this power, or any other, the legislature can make criminal the mixture or mingling of articles of food which are wholesome and nutritious, and prohibit the sale thereof." * * *
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> *Dorsey vs. State of Texas*, 40 L. R. A., 201, 202 (Tex., 1898).

A law having such effect as claimed for the Ohio statute by the respondent here, would be unconstitutional, and its mistaken construction by any individual to such effect is even less entitled to respect.

Respondent's property interests are entitled to protection, by injunction, against such attack, as that of respondent, set forth in the bill.

It is respectfully submitted that the learned Judge of the Circuit Court erred, both in refusing to entertain jurisdiction of the cause and in the dismissal of the bill without hearing, and that the judgment below should be reversed, with costs.

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